Negotiating Past the Zero-Sum of Intractable Sovereignty Positions by Exploring the Potential of Possible Party Interests: A Proposed Dispute Resolution Framework for the Tobacco Tax Debacle between the State of New York & the Seneca Nation of Indians

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I. INTRODUCTION[1]

In 1994, the Supreme Court declared in *Department of Taxation & Finance of New York v. Milhelm Attea & Bros., Inc.* that legislation passed by the State of New York imposing state taxes on cigarette sales made on Indian reservations to non-Indians was facially permissible.[2] However, by August 13, 2010—over a decade after the Supreme Court issued its holding in *Attea*—the State of New York's coffers remained bare of any tobacco tax

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[1] The terms "American Indian" and "Native American" are used interchangeably throughout this Note in order to maintain continuity with statutory language and the language of various authors and judges. However, it should be noted that both are umbrella terms that have become increasingly personal. The same is true of the terms "tribe" and "tribal," which are also offensive to some who feel the terms suggest Native groups were primitive, or lacked advanced social and governmental structures. Accordingly, the author makes every effort to use the specific Native nation or tribe when referring to a particular group. The Seneca Nation refers to itself as a nation rather than a tribe, and will be referred to as such throughout this note.

[2] Dep't. of Taxation and Fin. of N.Y. v. Milhelm Attea & Bros. Inc., 512 U.S. 61 (1994) [hereinafter *Attea*] (finding that:

> (1) [A] federal statute conferring on Commissioner of Indian Affairs authority to make rules and regulations with respect to sale of goods to Indians on reservations did not preempt state regulation reasonably necessary to the assessment or collection of lawful state taxes; (2) scheme under which quota was imposed on number of tax exempt cigarettes that wholesalers could sell for resale on reservation, and imposing recordkeeping requirements, did not impose an excessive burden on Indian traders; and (3) requirement that retailers obtain state tax exemption certificates did not impose excessive burden on Indian traders.).

revenue from its Indian nations.[3] In response to the state's embarrassing failure to collect these taxes, New York City Mayor Michael Bloomberg issued a few words of advice to New York Governor David Paterson on how he might address the issue: "*You know, get yourself a cowboy hat and a shotgun . . . If there's ever a great video, it's you standing in the middle of New York State Thruway saying . . . 'Read my lips—the law of the land is this, and we're going to enforce the law.*"[4]

Mayor Bloomberg's bellicose comment was directed at the Seneca Nation of Indians,[5] who twice before—both times in protest over New York's imposition of cigarette taxes for sales made to non-Indians within the Seneca Nation's borders[6]—blockaded a strip of the New York State Thruway in what became a violent confrontation between members of the Seneca Nation, New York State troopers, and New York State riot police.[7] Perhaps

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[3] *See* Gale Courey Toensing, *$130m Expected from Indian Cigarette Taxes Stubbed Out: Awkward!*, INDIAN COUNTRY TODAY, Jan. 13, 2012, Indiancountrytodaymedianetwork.com.

[4] Adam Lisberg et al., *Bloomberg Tells Paterson To Cowboy Up, Crack Down on Senecas Selling Tax-Free Smokes on NY Thruway*, N.Y. DAILY NEWS, Aug. 13, 2010, http://articles.nydailynews.com/2010-08-13/local/27072682_1_cigarette-taxes-untaxed-cigarettes-seneca-nation.

[5] [Hereinafter "Seneca Nation" or "Seneca"].

[6] Throughout this note, "non-Indians" is used to refer to individuals who are not official members of the Seneca Nation.

[7] The New York Thruway is a four-lane highway of which three miles pass through Seneca territory near Irving, New York. This three-mile strip has become the battleground between the State of New York and the Seneca Nation over issues of sovereignty and money. *See, e.g.*, *Senecas Clash with Police over Tax Ruling*, N.Y. TIMES, July 17, 1992, http://www.nytimes.com/1992/07/17/nyregion/senecas-clash-with-police-over-tax-ruling.html%E2%80%9CSenecas%27, [hereinafter *Senecas Clash*]; *see also* Lisberg et al., *supra* note 4. In 1992 a battle broke out between the Seneca Indians and New York when New York tried to enforce cigarette and gas excise taxes for on reservation sales made to non-Indians. *See Senecas Clash*, *id.* Over 200 Indians gathered to burn tires and throw debris over an overpass which resulted in a 30-mile stretch being shut down. *Id.* To control the violence, more than 200 New York State troopers with riot gear were sent to the reservation. *Id.* The incident resulted in an injunction on tax collection for New York's Indian Nations. *Id.* Protests by the Seneca Nation also occurred in 2007, *see* Lisberg et al, *supra* note 4 (discussing New York's 1997 "crackdown on the [Seneca Nation's] longstanding sales of its untaxed cigarettes to the general public" which led up to second state thruway incident in which "Indian nations burned tires in protest on the highway"), and again in 2010, *see* Gale Courey Toensing, *$130m Expected From Indian Cigarette Taxes Stubbed Out: Awkward!*, Indian Country Today Media Network, January, 13, 2012, http://indiancountrytodaymedianetwork.com/article/$130m-expected-from-indian-cigarette-taxes-stubbed-out%3A-awkward!-72350 (detailing the Seneca Nation and the Oneida Nation's response to efforts by the New York Department of

Mayor Bloomberg's frustration was the result of several years' of legislative and judicial failure to resolve New York's tobacco tax dispute with the Seneca Nation.[8] Or, maybe his anger and resentment stemmed from something much deeper—as the conflict between the State of New York and the Seneca Nation over state tobacco taxes is rooted in disputes over sovereignty dating back to the years prior to the drafting of the Articles of Confederation.[9]

Regardless of the motivations behind his off-color remark, Mayor Bloomberg's statement to Governor Paterson made two things clear. First, New York's legislative and judicial attempts to collect state tobacco taxes on Seneca tobacco sales have not been met with the submissive compliance for which New York had hoped; nor does it appear New York will gain such compliance from members of the Seneca Nation any time soon.[10] Second, despite the Seneca Nation's longstanding refusal to observe New York's state tobacco tax laws pertaining to Indian tobacco sales made to non-Indians on reservation lands, New York politicians, legislators, and other New York State officials are growing equally unyielding in their determination and efforts to collect the tax.[11]

Not surprisingly, this uncompromising dynamic between New York and the Seneca Nation has failed to produce a peaceful resolution in the tobacco tax debacle.[12] Instead, the adversarial adjudicative process which has hosted

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Taxation and Finance to "amend[] the state's cigarette tax law and companion regulations to require wholesalers and distributors to pay the $4.35-a-pack tax upfront on all cigarettes sold to reservations" by "announcing they would no longer buy the famous brand cigarettes manufactured by the Big Tobacco companies of Philip Morris"). Since the injunction on tax collection was removed in 2011, New York has had little success at collecting cigarette taxes from Indian Nations. *Id.*

[8] Thomas Kaplan, *In Tax Fight, Tribes Make, and Sell, Cigarettes*, NEW YORK TIMES (Feb. 22, 2010), http://www.nytimes.com/2012/02/23/nyregion/indian-tribes-make-own-cigarettes-to-avoid-ny-tax.html?pagewanted=all, (noting that "New York's governors have for years tried, and failed, to collect taxes from tribes for cigarette sales," and that according to the State Department of Taxation and Finance, "in the first six months of 2011 . . . [New York's] Indian nations imported 9.6 million cartons of brand-name cigarettes); *see also id.*,(detailing how a court ruling in the latter half of 2011 allowing the state to tax American wholesalers that supply cigarettes to Indian nations for resale resulted in a significant loss of revenue by state tobacco wholesalers as Indian nations dramatically refraining from buying name-brand cigarettes, opting instead to stock their own shelves with Native brands).

[9] *See infra* Section II.

[10] *See infra* Section III.

[11] *See supra* note 4 and accompanying text.

[12] *See infra* Section III.

the dispute for the last several decades has made the situation worse.[13] Litigation centered on bitter and historically rooted accusations has required both parties to repeatedly bargain over stubborn positions in a legal arena that declares only one "winner" and one "loser."[14] Yet, the historical roots and contemporary interests fueling the conflict are too deep and complex for a sustainable resolution to suddenly flow from a process with this simple "win/lose" result.[15] The tobacco tax conflict between New York and the Seneca Nation—as it has been played out in the traditional legal arena—has unfortunately become a "zero-sum game."[16]

This note seeks to address the complex and multifaceted reasons why New York and the Seneca Nation have failed to resolve their dispute through state and federal legislative and judicial efforts.[17] It asks why state and federal adjudication over the dispute has resulted in neither a change of heart by New York, nor an increase in compliance by the Seneca Nation.[18] It finds its answer in the unsatisfied and increasingly hostile sovereignty interests possessed by *both* the Seneca Nation and New York, and the unyielding positions and stubborn requests to which they have attached themselves over the years.[19]

To move past the zero-sum, this note proposes both parties consider a good faith, interest-based negotiation approach, whereby both New York and the Seneca Nation work together as equals to separate their positions on sovereignty, from the dynamic and multifaceted interests their positions have served to protect.[20] Unlike in traditional legal processes, negotiation enables New York and the Seneca Nation to put a variety of interests on the table, where each can be heard, legitimized, and discussed independently from the static positions they represent.[21] Conducting a negotiation among equals requires both New York and the Seneca Nation to acknowledge and legitimize—through their behavior—the feelings and beliefs about sovereignty possessed by the other party. However, by conducting themselves in this manner, New York and the Seneca Nation enable themselves to make progress in a negotiation setting without having to

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[13] *See infra* Section III.

[14] *See infra* Section III.

[15] *See infra* Section IV.

[16] *See infra* Section IV.

[17] *See infra* Section IV.

[18] *See infra* Section IV.

[19] *See infra* Section IV.

[20] *See infra* Section IV.

[21] *See infra* Section IV.

discuss the merits of each party's sovereignty beliefs. The result is a dispute resolution framework in which New York and the Seneca Nation can work toward agreement on the many worthy—but for far too long, hidden—interests underlying the tobacco tax dispute.

Section II reveals how the same legislative and judicial developments which gave us our modern definition of "Indian sovereignty," in American jurisprudence simultaneously defined the parameters of state—including the State of New York—and federal sovereignty. Section III provides an overview of nearly three decades of failed legislative and judicial efforts between states, the federal government, and Indian nations, to resolve the dispute over state taxation of Indian tobacco sales to non-Indians on reservation land. Finally, Section IV argues that this failure is the inevitable result of the inability of traditional legal procedures to fully legitimize the important interests behind the parties' stubborn positions on sovereignty—thus creating a zero-sum dynamic. In response to this failure, the author proposes a negotiation framework that operates outside the zero-sum. The author sets forth a vision for a process in which both parties are free to bargain over a wide range of possible interests independent of—and while at the same time preserving—their unyielding positions on sovereignty.

II. BACKGROUND: THE SIMULTANEOUS EVOLUTION OF STATE, FEDERAL, & INDIAN SOVEREIGNTY

Section II details the tenuous development of federal, state, and Indian jurisdictional and sovereign boundaries, as each sovereign fought to retain as much sovereignty as possible in light of threatened encroachment from competing sovereigns. This section recounts the early historical events most often credited with shaping the definition of "Indian sovereignty" under American jurisprudence. It seeks to show how despite state trivialization of asserted Indian sovereignty interests, states developed a parallel interest in protecting their own sovereignty from encroachment—by both Indian nations and the federal government—simultaneously to the creation and development of the doctrine of "Indian sovereignty."[22] This parallel development in sovereignty interests in light of the threat of encroachment provides a compelling starting point for understanding the unyielding positions related to sovereignty asserted today by both New York and the Seneca Nation.

Part A begins with a discussion of the drafting of the Articles of Confederation and the Trade and Intercourse Act of 1790 to show how tribal

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[22] *See infra* Section II.

sovereignty was defined during the infancy of the United States Government. Part B discusses the Marshall trilogy—three pivotal and still influential cases which have established the standard for defining Indian sovereignty under federal Indian law. Part C focuses on a series of treaties the Seneca Nation signed with the federal government starting with the Fort Stanwix Treaty in 1784. These treaties—drafted and signed in America's formative years—provide the foundation for the Seneca Nation's opposition to taxation by New York. Part D focuses on modern federal Indian policy and how it has shaped contemporary views on Indian sovereignty.

A. *Early State and Federal Regulation of Indian Nations*

The contemporary dynamic between New York and the Seneca Nation can trace its roots to the decentralized manner of government which characterized the British colonial system.[23] Unlike the wealthier Spanish colonies, which could afford to centralize regulation of Indian affairs, each British colony was in charge of drafting and executing its own "Indian policy."[24] The relative autonomy over Indian affairs enjoyed by each colony continued into the American Revolutionary War.[25]

By the end of the American Revolutionary War, approaches to the regulation of Indian affairs began to differ by state.[26] Despite these differences, most states were at least in agreement that maintaining peace with the Indian nations was of increasing importance.[27] Defining the proper relationship between states and Indian nations, however, proved to be more

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[23] *See* DEBORAH A. ROSEN, AMERICAN INDIANS AND STATE LAW 8–9 (2007) (noting that by the beginning of the Revolutionary War, the British Crown retained the power to execute all treaties between its colonies and foreign nations, while the colonial governments handled matters regarding Indian trade). *See also* Robert J. Miller, *American Indian Influence on the United States Constitution and its Framers,* 18 AMERICAN INDIAN LAW REVIEW, 133, 137–38.

[24] Miller, *supra* note 23, at 137–38.

[25] *Id.*

[26] *See id.*

[27] *See* Miller, *supra* note 23, at 137–38 (noting that "The dread of Indians did not end with the Revolutionary War . . . The fledging United States was a weak country that needed peace and security after the Revolutionary War, not Indian troubles. Treaty negotiations with the Indians during these years were affected by the United States' desire for peace and its need to keep the tribes from allying with England."). *See also id.* at 137 (detailing Benjamin Franklin's belief that "securing the Friendship of the Indians is of the greatest consequence" (citing 6 BRUCE E. JOHANSEN, FORGOTTEN FOUNDERS: HOW THE AMERICAN INDIAN HELPED SHAPE DEMOCRACY 65 (1982)).

difficult.[28] Part of the challenge was that the Indian nations were different not only in size, power and possession of resources, but also in how they interacted with non-Indians.[29] Thus, each state had its own unique experience with the Indian nations within its borders that were sometimes vastly different from other states.[30] This common acknowledgement of urgency, coupled with a lack of consistency by states in both their experience and approach, made the regulation of Indian affairs a topic of great importance to the drafters of the Articles of Confederation.[31]

Initially, many drafters of the Articles of Confederation believed they could solve the "Indian problem" by deferring all issues regarding the Indian nations to the federal government, which it envisioned would have exclusive control in regulating Indian affairs. However, states with larger Indian populations such as New York, South Carolina, Georgia, and Virginia, argued that the role of regulating Indian affairs belonged in the hands of the individual states.[32] The result of the debate was a compromise:

> *The United States in Congress assembled shall also have the sole and exclusive right and power of... regulating the trade and managing all affairs with the Indians, not members of any of the States, provided that the legislative right of any State within its own limits be not infringed or violated* (emphasis added).[33]

This compromise offered little guidance about which powers over Indian affairs were truly possessed by the federal government, and which belonged to the state.[34] While this did not cause any immediate concerns, the ambiguity of the clause quickly became an unavoidable problem.

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[28] *See* Robert B. Porter, *Legalizing, Decolonizing, and Modernizing New York State's Indian Law*, 63 ALB. L. REV. 125, 126 (1999).

[29] *See id.* at 127. (recalling how at the time of the American Revolution, some of the most powerful tribes were those of the Haudenosaunee Confederacy, also known as the Iroquois, which included the Onondagas, the Cayugas, the Mohawks, the Tuscaroras, and the Senecas).

[30] *See generally* Miller, *supra* note 23, at 137–39.

[31] *See* JOHANSEN, *supra* note 27, at 11.

[32] *Id.*

[33] ARTICLES OF CONFEDERATION OF 1781, art. IX, para. 4.

[34] While the Articles of Confederation stated that Congress and the states then had concurrent jurisdiction over transactions with Indians within the United States, the action was subject to state law. *See* ARTICLES OF CONFEDERATION OF 1781, art. IX, para. 4.

The Revolutionary War had burdened the newly independent country with insurmountable war debt—necessitating a swift response by Congress.[35] Despite a robust Indian population out west that did not want to leave, Congress decided to fill its purse by selling "unsettled" western land to American settlers.[36] When the Constitutional Convention commenced in 1787, tensions were mounting between settlers and Indian nations in the west, and the looming threat of a possible Indian War weighed heavily on the minds of the Framers.[37] The high level of concern by the Continental Congress over the state of relations with the Indian populations led to the creation of an "Indian department," which was tasked with handling all Indian affairs.[38] States were not given a role in this new department.[39] The Framers additionally penned the "Indian Commerce Clause," which would become part of the newly drafted United States Constitution.[40] In the Indian Commerce Clause, the Framers explicitly gave the federal government—

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[35] *See generally* WOODY HOLTON, UNRULY AMERICANS AND THE ORIGINS OF THE CONSTITUTION (2007) (exploring how popular movements and social unrest following the Revolutionary War shaped the ratification process of the U.S. Constitution).

[36] *See id.* (describing how selling western land brought additional risks to as many worried about the foreign use of Indian tribes against the United States).

[37] *See* ALEXANDER HAMILTON, THE FEDERALIST PAPERS No. 24 161 (Clinton L. Rossiter ed., 1961) (quoting Alexander Hamilton who, in accounting for this fear, wrote that "[t]he savage tribes on our Western frontier ought to be regarded as our natural enemies, their natural allies [Britain and Spain], because they have most to fear from us, and most to hope from them."). *See also* 4 THE PAPERS OF ALEXANDER HAMILTON 198 (Harold C. Syrett ed., 1962) (describing the Framer's interest in protecting against future Indian attacks, and noting that Hamilton listed "protect[ing] . . . your western frontier against the savages" in a "review of the variety of important objects, which must necessarily engage the attention of a national government."); Robert G. Natelson, *The Original Understanding of the Indian Commerce Clause*, 85 DENV. U.L. REV. 201, 235–42 (2007) (detailing the Framer's fear of future Indian attacks). *Cf.* President George Washington, *Third Annual Address* (Oct. 25, 1791), *in* 2 PHILLIP B. KURLAND & RALPH LERNER, THE FOUNDER'S CONSTITUTION, 531 (1987) (explaining his desire to foster cooperation and neutrality with the Indian Nations, President George Washington said: "It is sincerely to be desired that all need of coercion in future may cease and that an intimate intercourse may succeed, calculated to advance the happiness of the Indians and to attach them firmly to the United States.").

[38] 4 SMITHSONIAN INST., HANDBOOK OF NORTH AMERICAN INDIANS: HISTORY OF INDIAN-WHITE RELATIONS, 29 (William C. Sturtevant gen. ed., Wilcomb E. Washburn vol. ed., 1988).

[39] *See id.*

[40] Country of Oneida v. Oneida Indian Nation, 470 U.S. 226, 234 (1985), at n.4 (noting that "Madison cited the National Government's inability to control trade with the Indians as one of the key deficiencies of the Articles of Confederation, and urged adoption of the Indian Commerce Clause" to remedy this deficiency.).

specifically Congress—the power "[t]o regulate Commerce with foreign Nations . . . and with the Indian Tribes."[41]

The Indian Commerce Clause, however, did not put an end to questions over who would regulate Indian affairs, or what this regulation would look like. Soon after the ratification of the Constitution, Congress enacted the Trade and Intercourse Act of 1790—the first piece of Congressional legislation in which Congress attempted to outline which regulatory powers over Indian affairs belonged to the federal government, and which belonged to states.[42] Congress intended the Trade and Intercourse Act of 1790 to prevent future Indian Wars, and to protect against Indian nations entering into alliances with foreign countries.[43] Congress also expressed concern over the possibility that states with large and powerful Indian populations would try to claim a "superior right" to trade with the Indian nations in their borders.[44] To enforce the federal government's superior right over states to regulate Indian commerce, Congress mandated that all private individuals wanting to do "trade or intercourse with the Indian tribes" obtain a federal license.[45] The license requirement also prohibited states from conveying Indian land, and made the act of doing so an exclusive power of the United States federal government.[46]

B. *The Marshall Trilogy: Paving the way for Modern Federal Indian Law*

Following the ratification of the United States Constitution and its incorporation of the Indian Commerce Clause, Chief Justice John Marshall authored three infamous opinions for the Supreme Court in which he established the doctrinal framework still used today for interpreting Indian sovereignty under federal Indian law.[47] Chief Justice Marshall's three

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[41] U.S. CONST. art. I, § 8, cl. 3.

[42] ACT OF JULY 22, 1790, I Stat. 137.

[43] *See infra* note 44 and accompanying text.

[44] *See* Porter, *supra* note 28, at 151 (1999) (explaining that while the Trade and Intercourse Act was an express mandate for states to stop entering into treaties with their Indian tribes, it lacked enforcement power and states consequently continued to enter into treaties with the Indian nations).

[45] ACT OF JULY 22, 1790, §§ 1–3, I Stat. 137.

[46] ACT OF JULY 22, 1790, at § 4 (providing that states may not convey land "unless the same shall be made and duly executed at some public treaty, held under the authority of the United States").

[47] *See* CHARLES F. WILKINSON, AMERICAN INDIANS, TIME, AND THE LAW: NATIVE SOCIETIES IN A MODERN CONSTITUTIONAL DEMOCRACY, 25 (1987) *cited in* Miller, *supra*

opinions—*Johnson v. M'Intosh*,[48] *Cherokee Nation v. Georgia*,[49] and *Worcester v. Georgia*[50]—are appropriately referred to as the "Marshall Trilogy." Together, these three cases showcase the United States Supreme Court's earliest efforts to define Indian sovereignty under the new Constitution. They also reveal a Supreme Court unafraid to limit state sovereignty when control over the regulation of Indian affairs was at stake.[51]

Chief Justice Marshall's opinion in *Johnson v. M'Intosh*[52]—the first case in the trilogy—established the federal government's superior power over Indian land title.[53] Guided by the European "doctrine of discovery,"[54] the Supreme Court held the conveyance of tribal lands to "non-Indian" private individuals to come under the exclusive powers of the United States government.[55] Indian nations accordingly retained the right to occupy their land, but were prohibited from selling or otherwise ceding their land to anyone other than the country that "discovered" them—which in this case was said to be the United States.[56]

In the second case of the trilogy—*Cherokee Nation v. Georgia*[57]— the Cherokee Nation asked the Supreme Court to issue an injunction enjoining the State of Georgia from executing state laws which threatened to annihilate the Cherokee Nation as a political entity, and which would allow Georgia to seize Cherokee land for state use despite the land's protection under treaties

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note 23, at 139 (noting that the legal positions taken by Indian nations today can often be traced back to the cases in the Marshall trilogy cases which were "rendered at a time when Indian affairs occupied a central position in federal policy [when] [m]ost Indian tribes had not yet been included within state boundaries, [and] [i]n terms of both military power and population, Indian tribes were a significant factor").

[48] Johnson v. M'Intosh, 21 U.S. (8 WHEAT.) 543 (1823).

[49] Cherokee Nation v. Ga., 30 U.S. (5 PET.) 1 (1831).

[50] Worcester v. Ga., 31 U.S. (6 PET.) 515 (1832).

[51] *See* Miller, *supra* note 23 and accompanying text.

[52] *Johnson*, 21 U.S. (8 Wheat.) at 543.

[53] *Id.*

[54] *See* Miller, *supra* note 23, at 139 (stating that "Marshall relied upon the European 'doctrine of discovery' as granting the discovering nation both title to Indian lands and the sole right to acquire those lands from the natives.").

[55] 21 U.S. at 587 (finding that the federal government possesses the "exclusive right to extinguish the Indian title of occupancy, either by purchase or conquest").

[56] Johnson, 21 U.S. at 574. *See also* Miller *supra* note 23, at 139 n. 44 (explaining how Marshall's reasoning was borrowed from the practices of the English Crown prior to its relinquishment of all property and territorial rights after the Revolutionary War, whereby "[t]he Crown could grant title to others while the Indians still lived on the land [because] [t]hese grants were only subject to the Indians right of occupancy").

[57] *Cherokee Nation*, 30 U.S.at 1.

signed by the United States government.[58] Before addressing the merits of the case, Chief Justice Marshall first determined whether the Supreme Court had jurisdiction by asking whether an Indian tribe was a "foreign state" under the Constitution.[59] Relying on the text of the Indian Commerce Clause,[60] the Chief Justice concluded that Indian tribes were not "foreign states" for the purpose of finding constitutional jurisdiction.[61] Instead, Chief Justice Marshall determined Indian tribes were "domestic dependent nations" under the Constitution.[62]

Ridding the Indian nations of a foreign status under the Constitution was an enormous blow to Indian sovereignty. It effectively denied Indian nations the right to trade or negotiate with any nation other than the United States.[63] It also effectively decreased Indian nation self-sufficiency by creating a relationship between Indian tribes and the federal government akin to that of a "ward to his guardian"—thus officially creating the "trust" relationship between the federal government and Indian nations that is still in place today.[64]

The dispute between the Cherokee Nation and the State of Georgia continued in the third and final case of the Marshall Trilogy. In *Worcester v.*

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[58] *Id.* at 3–5.

[59] *Id.* at 15 (declaring that "[b]efore [the Court] can look into the merits of the case, a preliminary inquiry presents itself. Has this court jurisdiction of the cause?"); *id.* at 14 (finding the extent of the judicial power of the Supreme Court in Article 3, Section 2 of the Constitution which extends Supreme Court jurisdiction to "'controversies' between a state or the citizens thereof, and foreign states, citizens or subjects"); *id.* at 16 (finding that in order for the Court to have jurisdiction, the Cherokee Nation must be able to sue Georgia in the Court, which requires the Cherokee Nation to be a determined a foreign nation in the sense that the term is used in the Constitution).

[60] *See id.* at 15–16.

[61] *Id.* at 15–16 (finding the Founding Fathers did not have intend for Indian tribes to be considered foreign nations because "foreign nations" and "Indian tribes" appear separately in Article III, Section 2 of the U.S. Constitution.").

[62] *Id.* at 17 (writing for the majority, Marshal declared that "[i]t may well be doubted whether those tribes which reside within the acknowledged boundaries of the United States can, with strict accuracy, be denominated foreign nations," [and] may more correctly, perhaps, be denominated domestic dependent nations."). *Cf. id.* at 21 (taking the majority's finding one step further, Justice Johnson concurred with the majority opinion while adding that he "cannot but think there are strong reasons for doubting the applicability of the epithet *state*, to a people so low in the grade of organized society as our Indian tribes most generally are.").

[63] *See* WILKINSON, *supra* note 47, at 55–58. *See also* FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 122–23 (Univ. of N.M. Press photo. Reprint 1971) (1942).

[64] 30 U.S. at 17.

Georgia,[65] Chief Justice Marshall reminded Georgia that in entering into its treaties with the United States, the Cherokee Nation remained a "distinct, independent political communit[y]"[66] that possessed the right to self-government and existence as a state.[67] Thus, Indian nation sovereignty—as it existed within a "domestic dependent nations"[68] paradigm—was once again found to be firmly under the control of the federal government.[69] While federal control undoubtedly infringed upon Indian sovereignty, it also provided a check on further encroachment into Indian sovereignty by states.[70]

At the conclusion of the Marshall Trilogy, the "Indian nation" was defined as a unique sovereign entity that did not possess the full sovereign rights of a foreign nation, but yet was still separate and distinct from other states within the United States. As a domestic dependent nation, an Indian nation accordingly possessed the right to self-government and sovereign state existence, but would always be under the "protection" of the federal government.

C. *The Seneca Treaties: Laying the Foundation for Seneca Opposition to New York's Current Tax Scheme*

In addition to the case law established in the Marshall Trilogy,[71] contemporary state and Indian sovereignty has been shaped by the historical treatment of specific treaties between the federal government and the Seneca

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[65] *Worcester*, 31 U.S. at 515–58 (finding a Georgia law to be an "unconstitutional interference" with the United States' relationship with the Cherokee Nation, after Samuel Worcester, a white Christian missionary was found to have violated Georgia law when he failed to obtain a license or swear his allegiance to the State of Georgia before he moved within the limits of Cherokee nation).

[66] *Id.* at 559.

[67] *Id.* at 559–61; *see also* JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 1094 (1833), *reprinted in* 2 KURLAND & LERNER, THE FOUNDER'S CONSTITUTION 531 (1987), at 550 (concurring with Chief Justice Marshall, Story noted that "Indians . . . were always treated, as distinct, though in some sort, as dependent nations. Their territorial rights and sovereignty were respected . . . their right of self-government was admitted; and they were *allowed* a national existence.") (emphasis added).

[68] Cherokee, 30 U.S. at 17.

[69] *See* Hope M. Babcock, *A Civic-Republican Vision of "Domestic Dependent Nations" in the Twenty-First Century: Tribal Sovereignty Re-envisioned, Reinvigorated, and Re-empowered*, 2005 UTAH L. REV. 443, 481 (2005).

[70] *See id.*

[71] *See supra* Section II B.

Indians.[72] Shortly after the birth of the United States, the federal government entered into a series of three treaties with the Seneca Indians: The Fort Stanwix Treaty (1784),[73] The Fort Harmar Treaty (1789),[74] and The Treaty of Canandaigua (1794).[75] With each treaty the federal government attempted to better define its relationship with the Seneca Indians, and signified the triumph of federal power over states to regulate Indian affairs. Subsequent to signing the treaties, however, the Seneca Indians faced a fierce struggle to maintain their land in wake of an increasingly ambitious removal policy by the State of New York.[76] This struggle reached its apex during 1842, and concluded with the controversial signing of the Buffalo Creek Compromise Treaty.[77]

1. *Fort Stanwix Treaty (1784)*

The Fort Stanwix Treaty (1784) is believed to have resulted from the failure of the United States government to consider the interests of the Haudenosaunee—which at the time encompassed the Seneca Indians, and which would later become known as the Six Nations[78]—when signing the

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[72] During the time of the Marshall Trilogy, the Seneca Indians were not yet an official Indian nation. The Seneca Indians became "The Seneca Nation of Indians" as part of the negotiations surrounding the Buffalo Creek Compromise Treaty. *See* ROSEN, *supra* note 23, at 8.

[73] Treaty with the Six Nations, Oct. 22, 1794, 7 Stat. 15, [hereinafter Treaty of Fort Stanwix].

[74] Treaty with the Six Nations, Jan. 9, 1798, 7 Stat. 33 [hereinafter Treaty of Fort Harmar].

[75] Treaty with the Six Nations, Nov. 11, 1794, 7 Stat. 44, [hereinafter Canandaigua Treaty].

[76] G. Peter Jemison, *Sovereignty and Treaty Rights—We Remembe*r, 7 ST. THOMAS L. REV. 631, 634 (1995). In 1779, three years prior to the end of the Revolutionary War, George Washington ordered Major General John Sullivan to lead an army into the Finger Lakes region of New York where the Haudenosaunee were known to reside. Although few lives were lost on either side, the altercation resulted in the destruction of over fifty Haudenosaunee towns and an abundance of valuable croplands. *Id.*

[77] Treaty with the Senecas, May 20, 1842, art. IX, 7 Stat. 586 (also known as "The Buffalo Creek Compromise Treaty").

[78] The Haudenosaunee was originally comprised of the Seneca, Mohawk, Oneida, Onondaga, and Cayuga, but became known as the Six Nations in 1722 after the Tuscarora nation joined the Haudenosaunee. *See generally* FRANCIS JENNINGS, THE HISTORY & CULTURE OF IROQUOIS DIPLOMACY: AN INTERDISCIPLINARY GUIDE TO THE TREATIES OF THE SIX NATIONS AND THEIR LEAGUE (1995); *see also* William N. Fenton, *Collecting Materials for a Political History of the Six Nation*, 93 Proceedings of the American Philosophical Society 233–38 (1949).

1783 Treaty of Paris to end the American Revolutionary War.[79] While initially much of New York's Indian population—including the Haudenosaunee[80]—was neutral to the War, many individual Indians sided with the British against the colonists.[81] At the end of the war, the British went north into Canada, but the Haudenosaunee—and thus, the Seneca Indians—found most of their land settled by American colonists.[82] The Haudenosaunee pushed back near the border of Pennsylvania, resulting in frequent fighting and increasing tension between the Haudenosaunee and local American settlers.[83]

The weak and disorganized government created by the Articles of Confederation at the end of the war did little to ease the tension or stop the violence.[84] Further, the Articles of Confederation was unclear on how the responsibility and power of regulating Indian affairs was to be divided between federal and state governments.[85] The State of New York took advantage of the Articles of Confederation's vague language to make room for American surveyors and future white settlers. To do this, it began directly entering into treaties with Indian groups who lacked legitimate legal status from the central government.[86] New York also began using Haudenosaunee land for military bounty lands—an act which Congress strongly challenged.[87] Yet, despite pressure from Congress, New York State Governor George Clinton did not wish to cooperate with the federal government on the matter, and accordingly failed to cease the state's practice of using Haudenosaunee land for this purpose.[88]

While Congressional tension with the State of New York mounted over the regulation of Indian affairs, Congress was growing increasingly aware of

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[79] *See* Jemison, *supra* note 76, at 634.

[80] The Haudenosaunee included the Iroquois Confederacy and became the "Six Nations" when the Tuscarora Nation joined. *See id.*

[81] *See id.*

[82] *Id.*

[83] *Id.*

[84] BRUCE E. JOHANSEN, ENDURING LEGACIES: NATIVE AMERICAN TREATIES AND CONTEMPORARY CONTROVERSIES 46 (2004) [hereinafter ENDURING LEGACIES].

[85] *See id.*

[86] *See id.* (explaining that one such group lacking legitimate legal status was the Haudenosaunee. The State of New York also permitted non-state entities, such as land speculating companies to directly enter into treaties with New York.).

[87] *See* LAURENCE M. HAUPTMAN, CONSPIRACY OF INTERESTS: IROQUOIS DISPOSSESSION AND THE RISE OF NEW YORK STATE 63 (1999).

[88] *See id.*

Haudenosaunee activity for other reasons.[89] With the Pennsylvania border town skirmishes and knowledge of many Indians aligning themselves with the British during the past war fresh on their mind, Congress grew deeply concerned that conflict with the Haudenosaunee could interfere with the safety of the colonies, as well as with American expansion westward into the Ohio Valley.[90] In 1784, Congress—asserting its federal sovereign power over Indian affairs—entered into the Treaty of Fort Stanwix[91] with four members of the Haudenosaunee: the Seneca, Mohawk, Onondaga, and Cayuga.[92]

In the Treaty of Fort Stanwix,[93] Warrior Chiefs Joseph Brant of the Mohawk Indians, and Cornplanter of the Seneca Indians, ceded land in both the Ohio Valley and western New York to the federal government—a move which subsequently provided a new Haudenosaunee border.[94] In return, the federal government promised the Haudenosaunee protection over Haudenosaunee lands, as well as "*[security] in the peaceful possession of the lands they inhabit east and north of the same.*"[95]

Unfortunately, the treaty did little to help bring about the peaceful environment of which it spoke because the State of New York had other plans. New York continued to encourage settlers to engage in land "sales" with the Indian nations regardless of whether the land was past the border drawn by the federal government in the Fort Stanwix Treaty.[96] It also brought great humiliation and frustration to several tribal leaders who were distraught with grief and guilt over the large land concessions lost under the treaty.[97]

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[89] Steven P. McSloy, *Border Wars: Haudenosaunee Lands and Federalism*, 46 BUFF. L. REV. 1041, 1049 (1998).

[90] Jemison, *supra* note 76, at 634–35.

[91] Treaty of Fort Stanwix, art. III, Oct. 22, 1784, 7 Stat. 15.

[92] Jemison, *supra* note 76, at 634–35.

[93] Treaty of Fort Stanwix, art. III, Oct. 22, 1784, 7 Stat. 15.

[94] Jemison, *supra* note 76, at 635.

[95] Treaty of Fort Stanwix, art. III, Oct. 22, 1784, 7 Stat. 15.

[96] *See* HAUPTMAN, *supra* note 87, at 63–64 (describing how white settlers would often obtain Indian land for very little and then sell it for a rather large profit); *see also id.* at 64 (noting that "Land 'purchased' by state 'treaty' from Oneidas for fifty cents an acre was sold for seven to ten times its original purchasing price.").

[97] *See* BARBARA GRAYMONT, THE IROQUOIS IN THE AMERICAN REVOLUTION 16–17 (1971) (describing how the "Indians were extremely frustrated in their attempts to secure a written copy of the American commissioners' speeches and the treaty."); *see also id.* at 278 (noting that devastating illness and factionalism among the tribes made it difficult for the treaty to gain the legitimacy it needed to establish peace).

2. *Fort Harmar Treaty (1789)*

The Fort Harmar Treaty of 1789 attempted to correct the enforcement and legitimacy problems of the Fort Stanwix Treaty by essentially mirroring the terms of the Fort Stanwix Treaty[98]—but this time under the protection of the Indian Commerce Clause of the newly ratified Constitution. The Fort Harmar Treaty confirmed the boundary lines for the Haudenosaunee established in the prior Treaty,[99] as well as the intentions of the United States to surrender its claims to Haudenosaunee lands east and north of the boundary line called for in the Treaty.[100] This time, the sovereignty of the federal government over the state in its exclusive treaty making powers with the Indian nations was made loud and clear.

3. *Treaty of Canandaigua (1794)*

While the Treaties at Fort Stanwix and Fort Harmar sought to establish peaceful relations between the United States and the several Indian tribes comprising the Haudenosaunee, the 1794 Canandaigua Treaty[101] was envisioned as a treaty to finally end the western Indian wars once and for all,[102] as well as cease fears of any Indian territory ever again aligning itself with a foreign enemy.[103]

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[98] Treaty of Fort Stanwix, art II, 1784, 7 Stat. 15 (describing how the Six Nations, and especially the Oneidas were again "secured in the possession of the lands on which they are settled").

[99] Treaty of Fort Harmar, art. II, 1789, 7 Stat. 33. The Haudenosaunee and the U.S. federal government agreed "to renew and confirm all the engagements and stipulations entered into at the beforementioned treaty at Fort Stanwix." *Id.* at art. I.

[100] Treaty of Fort Harmar, art. II, 1789, 7 Stat. 33. *See also* Barbara A. Mann, *The Greenville Treaty of 1795: Pen-and-Ink Witchcraft in the Struggle for the Old Northwest, in* ENDURING LEGACIES 135, 162 (2004) (noting how many native sources and traditions suggest that man Haudenosaunee questioned the legitimacy of the tribal leaders' mandate at Fort Harmar to enter into such an agreement).

[101] Treaty of Canandaigua, Nov. 11, 1794, 7 Stat. 44. [hereinafter Canandaigua Treaty] (also known as the "Pickering treaty" after U.S. Commissioner Thomas Pickering). For an in depth historical analysis of the 1794 Treaty of Canandaigua, *see* Cayuga Indian Nation v. Cuomo, 758 F.Supp. 107 (N.D.N.Y. 1991).

[102] COHEN, *supra* note 63, at 419.

[103] *See* WILLIAM N. FENTON, THE GREAT LAW AND THE LONGHOUSE: A POLITICAL HISTORY OF THE IROQUOIS CONFEDERACY 637–40 (1998) (remembering the numerous military conflicts fought between American forces and Indians friendly to the British).

Unknown to the signatory parties at the time was that the Canandaigua Treaty[104] would become one of the most important agreements regarding Haudenosaunee—and eventually Seneca Nation—sovereignty to date.[105] It assigned and defined reciprocal obligations and limits by which the federal government and the signatory Indian tribes agreed to abide.[106] In particular, the treaty gave federal recognition to the Haudenosaunee lands, and gave a federal promise to the Haudenosaunee that "*the United States will never claim the same, nor disturb them or either of the Six [Iroquois] Nations . . . in the free use and enjoyment thereof: but the said reservations shall remain theirs, until they choose to sell the same to the people of the United States, who have the right to purchase.*"[107]

This language form the Canandaigua Treaty[108] was, and still is, interpreted by the Seneca Nation to mean is has a jurisdictional claim to its land under treaty rights to which the State of New York is prohibited from infringing upon without consent from the Nation.[109] The Seneca Nation interprets this jurisdictional claim to extend to most activities on their land, including commerce—an obvious point of contention today.[110]

The treaty also redrew borderlines for the Haudenosaunee—a process which in part required the returning of land to the Seneca Indians that had been relinquished in the Fort Stanwix and Fort Harmar Treaties.[111] In exchange, the Haudenosaunee tribes agreed to recognize claims by the

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[104] Canandaigua Treaty, Nov. 11, 1794, 7 Stat. 44.

[105] *See* ENDURING LEGACIES, *supra* note 84, at 46–47, ("[T]he treaty is *not* a treaty of conquest, nor does it end a war. Peace had been already established between the United States and the Haudenosaunee at the Treaty of Fort Stanwix in 1784 . . . Overall, the Treaty of Canandaigua is a treaty between two sovereigns: the Six Nations on the one hand and the United States on the other.").

[106] *See* ENDURING LEGACIES, *supra* note 84, at 47.

[107] Canandaigua Treaty, *supra* note 101, at art. II.

[108] *Id.*

[109] *See Public Hearing on the Matter to Investigate New York State's Attempt to Collect Taxes Generated by Native Americans both on Indian Reservations and over the Internet to Non-Native Americans Before the S. Comm. on Investigations and Gov't Operations*, 2009-2010 Sess. 7–8 (N.Y. 2009) (*statement of J.C. Seneca, Co-Chair of the Seneca Nation of Indians Foreign Relations Comm.*) [hereinafter *Testimony of J.C. Seneca*] (explaining that that when combined with the language of the Buffalo Creek Treaty Compromise Treaty of 1840, the Senecas read the language from the Canandaigua Treaty to mean that "[N]o outside government, including the United States, has any authority to tax or regulate us, our lands, . . . or interfere with our government.").

[110] *See id.*

[111] Canandaigua Treaty, *supra* note 101, at arts. III-IV. *See also* COHEN, *supra* note 63, at 419.

United States government to land in the Ohio territory, as well as to land west of established American borders.[112] The treaty was a federal affirmation of the sovereignty possessed by the Haudenosaunee tribes to enter into such an agreement with the United States independent of consent by the State of New York. [113]

At first the treaty seemed to have delivered on its promise to end the threat of current or future devastating Indian wars, and gave hope to the possibility of resolving longstanding conflicts between the Haudenosaunee and the federal government.[114] However, this hope was short-lived as critics of the treaty believed it "had the effect of placing the tribes and their reservation beyond the operation and effect of state laws."[115] This was entirely disagreeable to New York State Governor DeWitt Clinton. Despite the signing of the Treaty of Canandaigua, Governor DeWitt Clinton's deeply held conviction that Indians were destined to extinction led to an aggressive removal policy which sought to transport New York's "Indian problem" to the west.[116] Additionally, under Governor DeWitt Clinton's leadership, New York expanded its claims of state jurisdiction over Indian affairs by asserting criminal jurisdiction over crimes committed by one Indian against another—an intrusion the federal government had explicitly protected the Seneca Indians against in prior treaties.[117]

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[112] Jack Campisi & William A. Starna, *On the Road to Canandaigua: The Treaty of 1794*, 19 AM. INDIAN Q. 467, 467 (1995) (explaining how the treaty "ended a turbulent period of enmity that had threatened to engulf the fledgling United States in what would have been a destructive Indian war").

[113] HAUPTMAN, *supra* note 87, at 90.

[114] *See* Campisi & Stama, *supra* note 112; *see also* HAUPTMAN, *supra* note 87, at 90 (noting "The treaty resolved longstanding issues that had never been resolved between the Iroquois, most notably, the Seneca, and the federal government at the end of the American Revolution.").

[115] COHEN, *supra* note 63, at 419.

[116] VIVIAN C. HOPKINS, DE WITT CLINTON AND THE IROQUOIS, 8 ETHNOHISTORY 213, 214 (1961). *See also* HAUPTMAN, *supra* note 87, at 17 (explaining that Clinton, like many others of the time, also viewed western and central Indian land in New York as the ideal place to expand trade and transportation because the Erie Canal had just been completed and the "transportation revolution" was well underway); *id.* at 3 (finding that while these events brought great wealth to non-Indian settlers on these lands, it has also been attributed to the "undoing of the Iroquois"). It should also be noted that it was also no secret that New York Indian lands were rich with agricultural and natural resources, and Clinton surely felt New York should claim its piece. *Id.* at 17.

[117] *See, e.g.*, Hatch v. Luckman, 118 N.Y.S. 689, 694–95 (N.Y. Sup. Ct. 1909) (reviewing a case where a man was sentenced to murder by New York authorities for abiding by a Seneca Tribal Counsel ruling to execute a Seneca woman for practicing witchcraft). *See also* Murray v. Wooden, 17 Wend. 531, 531 (N.Y. Sup. Ct. 1837)

4. *Buffalo Creek Compromise Treaty (1842)*

The battle between the State of New York and its Indian nations intensified during the first half of the nineteenth century as completion of the Erie Canal quickly turned the City of Buffalo, New York into one of the largest cities in the United States.[118] However, white settlers who flocked to Buffalo were met with much resistance from the Seneca Buffalo Creek Reservation that bordered the newly thriving city.[119] Seneca resistance to selling their land made clear to eager white settlers that their dreams of homesteading near Buffalo would require the removal of all Indian populations which stood in their way.[120] Some white settlers were able to move past Seneca resistance by purchasing land bordering the reservation—however, those who were not so fortunate began pressuring the federal government to flex their muscles and push the Indians out.[121]

In 1823, John C. Calhoun, Secretary of War under President James Monroe, responded to the settlers' anxiety by allowing the Ogden Land Company to conduct a preliminary survey of the Buffalo Creek lands.[122] While the Ogden Land Company put pressure on Indian nations to sell their land, the Seneca Indians adamantly resisted, resulting in the appointment of local Judge Oliver Forward to handle the disobedient Seneca Indians.[123] On August 31, 1826, Judge Forward, acting under the authority of the United States government, brought about a settlement between the Ogden Land Company and the Seneca Indians in a controversial treaty that reduced

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(finding the validity of an Oneida Indian's land deed from 1809 despite the presence of federal treaties prohibiting such intrusion).

[118] HAUPTMAN, *supra* note 87, at 114–15.

[119] *See id.* at 101–02 (detailing the rapid increase in white settlers during this period in history).

[120] HOPKINS, *supra* note 116, at 216 (detailing Governor Clinton's belief that that only removal of the New York Indian tribes to the west could truly solve the "problem of New York Indians").

[121] HAUPTMAN, *supra* note 87, at 114–15 (describing how many white settlers took to lobbying the President to remove the Indians from the land so it could be opened up for settlement by white settlers).

[122] *Id.* at 119. Note that the Ogden Land Company was a group of politically powerful and well-connected land speculators. *Id.*

[123] *Id.* at 148 (noting how the Senecas withstood pressure by the Ogden Land Company to sell their land). *See also* N.Y. STATE ASSEMB., REP. OF SPEC. COMM. TO INVESTIGATE THE INDIAN PROBLEM OF THE STATE OF N.Y., 1889–51, 1888 Sess., at 23 (1888) [hereinafter Whipple Report].

Seneca land by 87,000 acres.[124] The treaty resulted in the ceding of several reservations by the Seneca Indians, as well as the reduction of the Buffalo Creek, Tonawanda, and Cattaraugus reservations.[125]

It was not long before troubling accusations about the nature of the treaty arose. Almost immediately after the signing of the treaty, allegations surfaced that Judge Forward was paid by the managers of the Ogden Land Company and that some of the Seneca Chiefs had been bribed to accept terms that were grossly against their interests.[126] Red Jacket, a Seneca leader, wrote to President John Quincy Adams regarding the Seneca Indians' great opposition to the treaty.[127] Red Jacket stated that the Seneca Indians were only given two days to produce an answer on whether they would sell their land, and that they were additionally threatened with being forcibly driven off their land if they refused to sign.[128] On March, 24, 1828, President John Adams responded by meeting with Red Jacket and two other Seneca Indians who pleaded with the President to investigate the signing of the treaty, and to refrain from acting upon their removal to the west.[129] The meeting resulted in the failure of the treaty to achieve ratification.[130]

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[124] *See* Seneca Nation v. Christy, 162 U.S. 283, 285 (1896) ("By a treaty and conveyance on that day the Seneca Nation, by its sachems, chiefs, and warriors, in the presence of a . . . commissioner appointed by the United States, conveyed a tract of eighty-seven thousand acres of [its] lands . . . for the consideration of $46, 216, acknowledged by the deed to have been in hand and paid."). *See also* Christy, 162 U.S. at 285 (stating the amount of land to be ceded by the Seneca Nation under the treaty); HAUPTMAN, *supra* note 87, at 15–55.

[125] Whipple Report, *supra* note 123, at 23; HAUPTMAN, *supra* note 87, at 15–55.

[126] *See* HAUPTMAN, *supra* note 87, at 154–56 (stating that the criticism of Forward was so high the judge wrote to President John Quincy Adams for support, explaining that all parties, including the Seneca Chiefs were fully aware and knowledgeable of the proposals, and that the Seneca Chiefs voluntarily agreed to sell their lands).

[127] *Id.* at 155–56.

[128] *Id.* at 157.

[129] *See id.* at 158.

[130] *Id.*; *but see id.* at 159 (noting that while the Senate did not ratify the treaty it issued a resolution declaring that failure to ratify the treaty did not mean it disapproved of its terms. President Adams appeared to be somewhat persuaded by Seneca claims because he appointed Richard Livingston to investigate the circumstances of the 1826 treaty). In his report, Livingston found the following evidence to suggest copious amounts of fraud to have surrounded the signing: (1) the Seneca Nation was not willing to sell their land without ten, not two, days of consideration; (2) interpreters for the Seneca were bribed to falsely influence the Seneca to extinguish their right to their land; (3) the Seneca Nation was under duress due to threats of federal removal; and (4) the financial dependency of many Chiefs were exploited by Forward and the Ogden Land Company. *Id.* at 159–60. *See also id.* at 160 (noting that collectively, these factors kept

Yet, federal government efforts to remove the New York Indian tribes did not stop there. On January 15, 1838, the federal government signed a treaty with the six of the New York Indian tribes whereby the federal government provided land for their removal and resettlement in Kansas.[131] However, when past disputes over the previous Ogden Land Company ordeal resurfaced and kept the Seneca Indians from complying, the federal government shifted its strategy and moved away from its removal policy with respect to the Seneca Indians.[132] Instead, the United States government negotiated a "compromise treaty" with the Seneca Indians which returned the Allegany and Cattaraugus reservations to them, but left the Buffalo Creek and Tonawanda.[133] The treaty stated that the United States would "*protect . . . the lands of the Seneca Indians, within the State of New York . . . from all taxes, and assessments for roads, highways, or any other purpose.*" [134]

Unlike most New York Indian territories that were less successful in resisting federal and state demands to sell their land, the Seneca Indians emerged from their signing of the Buffalo Creek Compromise Treaty of 1842[135] with a federal promise to protect it from encroachment by the State of New York. This enabled the Seneca Indians to secure its sovereign boundaries and create an independent constitutional government—*The Seneca Nation of Indians*.[136] However, this did not sit well with the State of New York, who in the latter half of the nineteenth century had successfully removed most of its eastern Indian tribes to the west, only to have its efforts to remove the Seneca Nation blocked by a federal treaty.[137]

In 1886, The Supreme Court found legislation taxing the Seneca Indians which was passed by the State of New York during the Buffalo Creek fiasco to violate federal treaties—further frustrating New York's efforts to exert

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the treaty from resubmission to the Senate). *See generally* Granville Ganter, *Red Jacket and the Decolonization of Republican Virtue,* 31 AM. INDIAN Q. 559, 570–71 (2007).

[131] Treaty with the New York Indians, Jan. 15, 1838, 7 Stat. 550. *See* COHEN, *supra* note 63, at 420.

[132] Treaty with the Senecas, May 20, 1842, 7 Stat. 586.

[133] *See* HAUPTMAN, *supra* note 87 at 177.

[134] Treaty with the Senecas, at art. IX (emphasis added).

[135] Treaty with the Senecas, at art. IX.

[136] *See* Testimony of J.C. Seneca, *supra* note 109, at 5; Porter *supra* note 28, at 138 (describing how the creation a constitutional republic for the Seneca Nation can be greatly attributed to the pressure New York provided in the "Seneca Revolution"); HAUPTMAN, *supra* note 87, at 12.

[137] ROSEN, *supra* note 23, at 76; *see id.* at 79.

control over the Seneca Nation.[138] In an incredible blow to New York's perceived sovereign power to regulate Indian affairs within its borders, the Supreme Court disapprovingly told New York that its attempts at taxing the Seneca Nation and other Indian nations was "a very free, if not extraordinary, exercise of power over [the] reservations and the rights of Indians, so long possessed and so frequently guaranteed by treaties."[139] The Court further emphasized that "the rights of Indians do not depend on this or any statutes of the State, but upon treaties, which are the supreme law of the land."[140] The Court confirmed that under the treaties Indians "were entitled to the undisturbed enjoyment [of their] ancient possessions and occupancy" unless removed by the federal government.[141]

By the turn of the century, the Court had unambiguously rejected all of New York's efforts to impose a land tax on the Seneca Nation, making it clear the federal government possessed the exclusive right to control Indian affairs, and that states like New York were to adhere to the terms established by Congress. As the treaty era came to an end, New York had been transformed from a state government with an aggressive self-proclaimed sovereignty right to enter into its own treaties with its Indian groups and to tax Indian land, to one whose state powers had been limited by the federal government's treaties, and whose state sovereignty had been diminished by the Supreme Court in affirmation of Seneca's treaty rights to prevent state encroachment.

However, despite this victory for the Seneca Nation, the Seneca Nation experienced a massive change during the treaty era—finding its livelihood

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[138] *In re* The New York Indians, 72 U.S. (5 Wall.) 761, 765 (1866) (reversing a decision of the New York Court of Appeals which upheld New York legislation providing that "[T]he failure to extinguish the right of the Indians . . . shall not impair the validity of said taxes, or prevent the collection thereof."); *see also* 72 U.S (5 Wall) at 768 ("This explanation . . . removes the inference that might otherwise be drawn, that the legislature were encouraging . . . direct interference by the owners of the right of pre-emption with these ancient possessions and occupations, secured by the most sacred of obligations of the Federal government.").

[139] 72 U.S. (5 Wall) at 766.

[140] 72 U.S. (5 Wall) at 768.

[141] 72 U.S. (5 Wall) at 768–70 (reiterating the text of the Treaty of Canandaigua, the Court affirmed federal acknowledgement that the "reservations" are the property of the Senecas). *See also id.* at 770 (explaining that "[Until the Indians have sold their lands, and removed from them in pursuance of the treaty stipulations," the Senecas retain their original treaty rights, and that state taxation of these lands before removal was "premature and illegal."); *id.* at 771 (describing the Seneca reservations as "wholly exempt from state taxation," and thus, state taxation was "an unwarrantable interference, inconsistent with the original title of the Indians and offensive to their tribal relations").

and very existence as a people threatened by two governments, both of whom were foreign to its people, yet claimed control over them. Understandably, the Seneca Nation has consistently faced a very real and significant threat to their sovereignty as a nation and as a people. Yet as the history of the treaty era reveals, the sovereignty interests at stake for New York were also challenged and shaped parallel to the development of Seneca Nation sovereignty.

D. *From the Indian New Deal to Self-Determination: The Federal Policies That Shaped Contemporary Views on Indian Sovereignty*

1. *The Indian New Deal*

In the early years of the United States, policies targeting Indians were greatly influenced by fear of the unfamiliar "Indian Savage" and the possibility of Indian wars.[142] These fears resulted in policies which encouraged American Indian assimilation into white American—and thus, Christian—culture.[143] However, by the early 1900's, many of these fears were beginning to subside just as assimilation policies were failing to convince most Indians to give up their customs and culture in exchange for the Anglo-American way of life.[144] In light of these changes, Congress began to disapprove of the large amount of federal resources being spent on the regulation of Indian affairs.[145] As a result, the federal government shifted its focus to a government-to-government approach which stressed economic development and the strengthening of Indian nation governments.[146] The federal government's new approach to regulating Indian affairs gave states a new opportunity to reclaim some state control over Indian affairs which they had lost during the treaty era.[147]

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[142] *See* ROBERT T. ANDERSON ET AL., AMERICAN INDIAN LAW: CASES AND COMMENTARY 130 (2008).

[143] *See id.*

[144] *See id.* at 128.

[145] *Id.*

[146] *See* ANDERSON ET AL., *supra* note 142, at 130.

[147] *See* Thomas v. Gay, 169 U.S. 264, 275 (1898) (holding that the State of Oklahoma could levy a tax on cattle owned by non-Indians that were grazing on Indian land because "[S]uch a tax is too remote and indirect to be deemed a tax or burden on interstate commerce, so it is too remote and indirect to be regarded as an interference with the legislative power of congress."); David H. Gutches, *Beyond Indian Law: The Rehnquist Court's Pursuit of States' Rights, Color-Blind Justice, and Mainstream Values*, 86 MINN. L. REV. 267, 268 (2001) (explaining how the Supreme Court has grown

One of the first policy responses to the federal government's new approach came in the form of the "Indian New Deal"—led by John Collier from the Bureau of Indian Affairs and legal scholar Felix S. Cohen, under the administration of President Franklin D. Roosevelt.[148] The Indian New Deal was supposed to provide affirmation of statutory support for Indian self-government, as well as prevent further loss of land for Indian nations.[149] Supporting President Roosevelt's views on Indian policies and the foundations of the New Deal, Congress enacted the Indian Reorganization Act in 1934 (IRA).[150] With the IRA, Congress attempted to restore some self-regulatory capacity to Indian nations, while keeping the government-to-government relationship between the United States and Indian nations intact.[151]

The Indian Claims Commission Act of 1946 (ICCA) was another product of the Roosevelt "New Deal" era that sought to promote strong government-

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increasingly in favor of a new form of subjectivism which favors states' rights); Alex T. Skibine, *Formalism and Judicial Supremacy in Federal Indian Law*, 32 AM. IND. L. REV. 391, 392 (2007–2008) (noting that the adoption of a form of subjectivism which favors states' rights "has not only allowed the Court to issue decisions mostly detrimental to Indian tribes, but has also allowed the Court to assume the lead in determining the terms of tribal incorporation within the United States political system, thus achieving judicial supremacy in an area constitutionally assigned the Congress").

[148] Patrice H. Kunesh, *Constant Governments: Tribal Resilience and Regeneration in Changing Times*, 19 KAN. J.L. & PUB. POL'Y 8, 18 (2009); G. William Rice, *The Indian Reorganization Act, the Declaration on the Rights of Indigenous Peoples and a Proposed Carcieri "Fix" Updating the Trust Land Acquisition Process*, 45 IDAHO L. REV. 575, 578 (2009).

[149] *See* Kunesh, *supra* note 148, at 18.

[150] Pub L. No. 73-383, 48 Stat. 984 (codified as amended at 25 U.S.C. §§ 461–79 (2006)).

[151] Mescalero Apache Tribe v. Jones, 411 U.S. 145, 152 (1973) ("The intent and purpose of the Reorganization Act was 'to rehabilitate the Indian's economic life and to give him a chance to develop the initiative destroyed by a century of oppression and paternalism.") (quoting H.R. Rep. No. 1804, at 6 (1934)). *See* Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 155 (1980) (stating that the IRA exemplified federal concern with fostering tribal self-government and economic development); 25 U.S.C. § 461 (ending the allotment of Indian land to individual Indians); § 463(a) (authorizing the Secretary of Interior to return surplus land to Indian governments that had never been settled); § 472 (mandating Indians receive job preferences for federal openings in the Indian office); § 470 (allowing chartered corporations to receive loans to promote economic development of their tribes and tribal members); § 476 (authorizing Indian nations to adopt their own constitution and set of bylaws for self-governance).

to-government relationships.[152] The ICCA called for a Commission which acted as a tribunal in the adjudication of claims brought on behalf of Indian nations against the United States.[153] Indian nations could bring claims "on the ground of fraud, duress, unconscionable consideration, mutual or unilateral mistake," land claims, and claims "based upon fair and honorable dealings that are not recognized by any existing rule of law or equity."

2. *Indian Self-Determination*

Despite President Roosevelt's enthusiasm for the Indian New Deal, the American public did not share in his excitement. This caused the policy to take a back seat from the beginning of World War II into much of the 1950's.[154] However, in 1959 the first modern case defining Indian sovereignty emerged when the Supreme Court unanimously held that state law could not interfere with an Indian nation's right to self-government.[155] President Lyndon B. Johnson further contributed to the development of an Indian self-determination policy by supporting both the passage of The Indian Civil Rights Act of 1968,[156] as well as local initiatives by Indian communities to advance his "War on Poverty."[157]

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[152] Pub. L. No. 79-726, 60 Stat. 1049 (codified as amended at 25 U.S.C. § 70 (1946)) (omitted from the U.S. Code when the Indian Claims Commission terminated in 1978).

[153] 25 U.S.C. § 2, 60 Stat. 1050.

[154] *See* ANDERSON ET AL., *supra* note 142, at 140 (explaining how Congress cut funding for Indian programs during the Second World War); *id.* at 141 (noting that this unfavorable perception of Indian New Deal programs carried on into the 1950's when a movement emerged wanting to rid the Indian of his special status to once again promote assimilation into white society).

[155] Williams v. Lee, 358 U.S. 217, 223 (1959) (finding that "[t]here can be no doubt that to allow the exercise of state jurisdiction here would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves . . . The cases in this Court have consistently guarded the authority of Indian governments over their reservations.").

[156] The Indian Civil Rights Act, 25 U.S.C. §§ 1321–22, 1326 (2009) (amending Pub. L. 280 by requiring consent by tribal governments to the assumption of state jurisdiction over Indian Country). *See* Santa Clara Pueblo v. Martinez, 436 U.S. 49, 64–65 (1978) (upholding the amendment of Pub. L. 280 with an acknowledgment of the significance and vitality of tribal governments in contemporary American legal framework). *See also* Kunesh, *supra* note 148, at 28 (noting that the Indian Civil Rights Act was passed right "at the height of the Civil Rights era," and "impressed on tribes constitutional notions of due process and equal protection. The Indian Civil Rights Act articulated these as restraints on tribal government action, but they resounded in individual rights."); *id.* (explaining that "[t]ribal courts became the most significant

However, it was President Richard Nixon who, in advancing Johnson's policies, officially "inaugurat[ed]" the principle of "Indian self-determination" by establishing a new discourse on federal Indian law policy that touched both its philosophical and administrative arms.[158] In his 1970 Special Message on Indian Affairs, Nixon offered the following outline for the new direction for contemporary federal-tribal relations:

> The first and most basic question that must be answered with respect to Indian policy concerns the history and legal relationship between the Federal government and Indian communities . . . Th[e] policy of forced termination is wrong . . . The special relationship between Indians and the Federal government is the result instead of solemn obligations which have been entered into by the United States Government . . . This, then, must be the goal of any new national policy toward the Indian people to strengthen the Indian's sense of autonomy without threatening this sense of community.[159] There is no reason why Indian communities should be deprived of the privilege of self-determination merely because they receive monetary support from the Federal government. . . [T]he Indian community should have the right to take over the control and operation of federally funded programs . . . .[160]

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expression of tribal sovereignty and tribal culture, resolving all manner of disputes, and defining the contours of tribal political and legislative authority, and intertwining customary tribal law and traditions into their decisions."). *But see id.* (noting that "[t]he Indian Civil Rights Act, like many other federal policies, reflects two sides of the political coin. One side represents the federal government's paternalism and one of the many federal mandates imposed on tribes irrespective of their status as a sovereign nation with formal and customary systems of law and order.").

[157] *See* Kunesh, *supra* note 148, at 28–29 (noting that the "War on Poverty" programs encouraged Indian self-determination). *See also* ANDERSON ET AL., *supra* note 142, at 149 (detailing how Indian communities often benefited from President Johnson's "War on Poverty" programs that emphasized local control, and that some Indian nations even began to develop social services and educational programs for their own members); *id.* (noting that the federal Office of Economic Opportunity supported on-Reservation legal aid programs funded studies which revealed significant disparities between Indians and non-Indians in health, education, and social welfare).

[158] *See* Kunesh, *supra* note 142, at 28–29.

[159] *See* President Richard Nixon, Special Message on Indian Affairs (1970), reprinted in Public Papers of the Presidents of the United States; Richard Nixon: 1969: Containing the Public Messages, Speeches, and Statements of the President (Univ. of Mich. Library 2005), *available at* http://www.epa.gov/tribalportal/pdf/president-nixon70.pdf (July 8, 1970) [Hereinafter Special Message on Indian Affairs] (showcasing Nixon's belief that Indian nations should head the development of this policy).

[160] *Id.*

An abundance of Congressional legislation flowed from President Nixon's remarks,[161] even into following administrations, including the Indian Self-Determination and Education Assistance Act of 1975 (ISDEA),[162] which allowed Indian nations to directly enter into contracts with the federal government as part of their taking control over the administration of federal programs for health, education, and general Indian welfare.[163] Most recently, President Barack Obama reaffirmed the federal government's commitment to "strengthen and build on the Nation-to-Nation relationship between the United States and tribal nations"[164] However, this federal policy does not transfer to states that are under no legal obligation to adopt the federal government's approach.

As Section III demonstrates, inconsistency and ambiguity between federal treaties, federal statues, and state law over the regulation of Indian tobacco sales on reservation land has created a confusing battle between three sovereigns with no acceptable legal remedy.

III. SOVEREIGNTY & THE DISPUTE OVER NEW YORK'S IMPOSITION OF TOBACCO TAXES ON SALES MADE BY SENECA INDIAN VENDORS TO NON-INDIANS ON SENECA LAND

The historical events discussed in Section II laid the foundation for defining Indian sovereignty under American jurisprudence[165]—however, this definition is helpful only if the sovereign whose sovereignty is being defined

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[161] *See, e.g.*, The Indian Financing Act of 1974, 25 U.S.C. §§ 1451–1544 (2009) (providing a revolving loan fund to promote reservation economic development); The Indian Self-Determination and Education Assistance Act of 1975, *infra* note 162; The Indian Health Care Improvement Act of 1976, 25 U.S.C. §§ 1603–83 (2009) (providing funding for health care on reservations); The Indian Child Welfare Act of 1978, 25 U.S.C. §§ 1901–63 (2009) (defining jurisdiction parameters on child custody proceedings involving Indian children); the Tribally Controlled Community College Assistance Act of 1978, 25 U.S.C. §§ 1801–52 (amended 2008) (supporting tribal institutions for higher education); the American Indian Religion Freedom Act of 1978, 42 U.S.C § 1996 (1978) (amended 1994) (affirming Indian religious and spiritual practices).

[162] 25 U.S.C. § 450 (1975) (amended 2006).

[163] 25 U.S.C. § 450(f)(a)(1); Rebecca Anita Tsosie, *What Does It Mean To "Build a Nation"? Reimagining Indigenous Political Identity in an Era of Self-Determination*, 7 ASIAN-PAC. L. & POL'Y J., 2006, at 38, 41 (2006).

[164] *Press Release, The White House, President Obama Announces Kimberly Teehee as Senior Policy Advisor for Native American Affairs* (June 15, 2009), *available at* http://www.whitehouse.gov/the_press_office/President-Obama-Announces-Kimberly-Teehee-as-Senior-Policy-Advisor-for-Native-American-Affairs/.

[165] *See supra* Section II.

is amenable to the terms of the definition, and believes them to be legitimate. If a sovereign Seneca Nation and its people find the definition of Indian sovereignty under American jurisprudence to be illegitimate, then they will lack the incentive to obey any New York State regulations passed under this "illegitimate" interpretation of their sovereignty. This reality is demonstrated every time a Seneca tobacco vendor refuses to comply with New York's tobacco tax regulations out of belief that federal treaties make him immune from such taxes. This logic can also be applied to the State of New York, in that it is less likely to abide by federal statutes or state court rulings if it does not believe the outcome of such processes accurately reflect the sovereign authority it believes itself to possess over the Seneca Nation. This is evidenced each time a New York State official or policy maker acts in disregard of a federal statute or state court ruling that limits how far the state can go to enforce its regulations on Indian vendors and carriers.

Coming to an agreement about the definition of sovereignty as it applies to both the State of New York and the Seneca Nation is greatly complicated by the fact that the two parties do not share similar interpretations of the history and case law that defined their sovereignty under American jurisprudence. Section III chronicles how these differences in interpretation resulted in legislative and judicial failure on behalf of the federal and state government to resolve the tobacco tax dispute between New York and the Seneca Nation.

A. *Federal and State Legislative Efforts to Secure Indian Nation Compliance*

Four decades of legislative history surround New York's efforts to regulate and tax Seneca tobacco sales. The earliest legislative efforts came in with the Jenkins Act.[166] Enacted by Congress in 1949, the Jenkins Act was created to prevent consumers from purchasing cigarettes from merchants in interstate commerce without paying all excise taxes imposed by the relevant jurisdictions.[167] While it did not as a whole prohibit "retailers"[168] from selling cigarettes in interstate commerce absent state-imposed excise taxes, the Jenkins Act served as federal mandate for all Indian and non-Indian cigarette retailers to engage in periodic reporting to the applicable state tax

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[166] *See* 15 U.S.C. §§ 375–378 (2000).

[167] Jonathan I. Sirois, *Remote Vendor Cigarette Sales, Tribal Sovereignty, and the Jenkins Act: Can I Get A Remedy?*, 42 DUQ. L. REV. 27, 29 (2003).

[168] *See* 15 U.S.C. §§ 375–78(1949) (includes both Indian and non-Indian retailers).

administrator to ensure the collection of an excise tax from the buyer.[169] Originally it was hoped the Jenkins Act would both prevent the evasion of state and local excise taxes on cigarettes, and keep interstate cigarette merchants from claiming an unfair competitive advantage over in-state retailers.[170] However, the Jenkins Act failed to deliver this outcome when Indian vendors and merchants operating from tribal lands—who are legally permitted to market and sell tax-free cigarettes to members of their own Indian nations[171]—refused to acknowledge the Jenkins Act's reporting requirements for tax-free sales made to non-Indians via the Internet.[172]

This was problematic for the enforcement arm of the Jenkins Act which originally stated that persons found in violation of the reporting requirements "shall be guilty of a misdemeanor and shall be fined not more than $1,000, or imprisoned not more than 6 months, or both."[173] The Federal Bureau of Investigations ("FBI") was responsible for investigating violations of the

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[169] 15 U.S.C. §§ 376(a) (2000). The Jenkins Act provides in relevant part:

> Any person who sells, transfers, or ships for profit cigarettes or smokeless tobacco in interstate commerce, whereby such cigarettes . . . are shipped into a State, locality, or Indian country of an Indian tribe taxing the sale or use of cigarettes . . . or who advertises or offers cigarettes . . . for such sale, transfer, or shipment, shall--
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> (1) first file . . . with the tobacco tax administrator if the State and place into which such shipment is made or in which such advertisement or offer is disseminated . . .
>
> (2) not later than the 10th day of each calendar month, file with the tobacco tax administer of the State . . . a memorandum or copy of the invoice covering each and every shipment of cigarettes . . . made during the previous calendar month into such State; the memorandum or invoice in each case to include the name and address of the person to whom the shipment was made, the brand, [and] the quantity thereof. . .

[170] *See* Sirois, *supra* note 167 at 29 (explaining that "[s]ince the relevant tax jurisdiction will directly assess the consumer for the taxes owed on their purchase, there is little incentive for someone to mail order or purchase cigarettes online when they will incur the same costs. Indeed, it is likely a higher cost would be realized when shipping and handling are taken into account . . . .").

[171] *See* Wash. v. Confederated Tribes of the Colville Reservation, 447 U.S. 134, 160 (1979). *See also* McClanahan v. State Tax Comm'n of Ariz., 411 U.S. 164, 170–71 (1973) (finding that "State laws are generally not applicable to tribal Indians on an Indian reservation except where Congress has expressly provided that State laws shall apply. It follows that Indians and Indian property on an Indian reservation are not subject to State taxation except by virtue of express authority conferred upon the State by act of Congress.") (*quoting* U.S. DEPT. OF THE INTERIOR, FEDERAL INDIAN LAW 845 (1958)).

[172] *See* Karen Setze, *Smuggling, Internet Sales Threaten States' Cigarette Tax Revenue*, ST. TAX TODAY, Sept.11, 2002, at 711 (explaining how Indian vendors stating they are not bound by Jenkins Act has made the "tax issue . . . tangled with considerations of tribal sovereignty.").

[173] 15 U.S.C. § 377 (1949), *repealed by* Pub.L. 111-154, § 2(d) (2010).

Jenkins Act, while the authority to enforce its provisions fell with the Department of Justice ("DOJ").[174] When this arrangement was originally established in 1949, the FBI and DOJ possessed adequate resources to engage in their respective tasks, and thus ensure compliance.[175] However, as fears of domestic terrorism increasingly became the focus of both agencies, the DOJ and FBI quickly found themselves lacking the necessary resources and incentive to pursue violations on behalf of state revenue departments for simple misdemeanors arising from the Jenkins Act.[176]

Lacking support from federal agencies to enforce the Jenkins Act, the amount of Internet sales by Indian vendors for excise-free cigarettes soared.[177] States seized the lack of federal presence as an opportunity to enforce their own statutes regulating excise tobacco tax collection.[178] Unlike the DOJ and FBI which have no direct involvement with state tax administrators—and who are often the last to learn of a possible violation under the Jenkins Act—states found themselves in the ideal position for identifying remote Indian vendors, and accordingly took a unilateral approach to encourage reporting compliance.[179] It is therefore not surprising that many remote Indian vendors turned out to be unwilling to comply with state requests for information—especially as the requests were intermittently made and carried no real threat of consequences.[180]

States responded to this lack of enforceability under the Jenkins Act by seeking out creative solutions which would enable them to combat the loss of

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[174] GENERAL ACCOUNTING OFFICE, INTERNET CIGARETTE SALES: GIVING ATF INVESTIGATIVE AUTHORITY MAY IMPROVE REPORTING AND ENHANCEMENT (2002) [hereinafter GAO REPORTING], at 2, *available at* http://www.gao.gov/news.items/do2743.pdf. It should be noted that the Bureau of Alcohol, Tobacco, and Firearms ("ATF") possessed ancillary authority to enforce the Jenkins Act through the Contraband Cigarette Trafficking Act "which makes it unlawful for any person to ship, transport, receive, possess, sell, distribute, or purchase more than 60,000 [3,000 packs, or 300 cartons] cigarettes that bear no evidence of state cigarette tax payment in the state in which the cigarettes are found." *Id.* at 8. However, this scenario was rare for Internet purchase, which ultimately limited the level of intervention by the ATF. *See* Sirois, *supra* note 167, at n. 17.

[175] *See* Sirois, *supra* note 167, at 31.

[176] *Id.*

[177] *See id.* at 48 (noting how the unwillingness of federal agencies to enforce the Jenkins Act made the statute pointless since its provisions were enforceable only by prosecution of interstate cigarette merchants under a felony criminal statute, which was unlikely absent extreme circumstances).

[178] *See* Setze, *supra* note 172 at 14.

[179] *See* GAO REPORTING, *supra* note 174, at 4, 11.

[180] *See* Sirois, *supra* note 167 at 53–54.

tax revenue resulting from claims to sovereign immunity evoked by many Indian nations. For example, some states attempted to use their state powers to regain control over the delivery channels used by cigarette vendors and merchants operating from within Indian country.[181] One way states did this was to regulate the transportation of unstamped cigarettes.[182] By definition, unstamped cigarettes are untaxed cigarettes.[183] As such, some states reasoned they could levy an excise tax on unstamped cigarettes which would grant them authority to seize any shipment of unstamped cigarettes[184]—including those coming from Internet sales by Indian vendors. To successfully implement these efforts, states enlisted the help of the common carrier industry and gave all carriers[185] notice that the state was permitted to seize any vehicle carrying unstamped (i.e. untaxed) cigarettes as contraband material—including shipments of unstamped (i.e. untaxed) cigarettes coming from Indian vendors[186]—absent special documentation explaining why the shipment was unstamped.[187] However, under the Jenkins Act, this strategy was limited to the amount of state resources available to carry out such an ambitious task, as well as by the willingness of common carriers to comply with a state's regulations.[188]

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[181] *See* Setze, *supra* note 172 (discussing steps taken by the state of Connecticut to secure compliance).

[182] *See id.* at 14.

[183] *See* Okla. Tax Comm'n v. Citizen Band Potawatomi Tribe, 498 U.S. 505, 514 (1991).

[184] *Id.*

[185] Under the Jenkins Act, a "common carrier" is defined as "[a] carrier that is required by law to transport passengers or freight, without refusal, if the charge is paid." BLACKS LAW DICTIONARY 205 (7th ed. 1999), contrasted with a "private (or contract) carrier," which is defined as "the carrier that is not bound to accept business from the general public . . ." *Id.* "For the purpose of cigarette delivery, remote vendors may employ contract carriers that would not be party to the agreements with state revenue departments to assist in the interdiction of deliveries of untaxed cigarettes." Sirois, *supra* note 167 at n. 137.

[186] *See* Setze, *supra* note 172.

[187] *Id.*

[188] *See* Sirois, *supra* note 167 at 54–55 (noting that "[A]s a practical matter, [this] approach is only useful as a scare tactic; no state has resources so abundant that they could interdict every shipment of cigarettes made via common carrier, nor would they wish to expend valuable resources to seize what could ultimately turn out to be a two-carton delivery."). *See also id.* at 55 (explaining that "[a]nother drawback [. . .] is that the state is at the mercy of common carriers that may or may not decide to provide notification that it is in possession of untaxed cigarettes," and that "if a carrier does a great deal of business with a particular vendor, it may decide that the risk of potential legal challenges with a state is worth the future business with that vendor.").

On March 31, 2010 the United States Congress attempted to correct the shortcomings of the Jenkins Act by signing into law The Prevent All Cigarette Trafficking Act of 2009 ("PACT Act").[189] As an amendment to the Jenkins Act, the PACT Act was intended to once and for all solve the enforcement problems of the Jenkins Act.[190] The PACT Act provided new definitions which explicitly stated its intent to reach certain parts of Indian Country.[191] It also upgraded the crime of smuggling untaxed cigarettes and smokeless tobacco to a felony.[192] It was hoped such efforts would make it easier for states to enforce their own taxation measures to sales made to non-Indians regardless of place of sale.[193]

While these changes may seem small, their impact is not. In wake of the enactment of the PACT Act, Indian nations—including the Seneca Nation—have grown increasingly concerned with threats to their sovereign right to engage in nation-to-nation tobacco trade with other Indian nations absent fear

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[189] 15 U.S.C. §§ 375-378 (2009).

[190] *See e.g.*, MEMO FROM THE COALITION TO STOP CONTRABAND TOBACCO (April 6, 2010) (proclaiming in reference to the enforcement shortcomings of the Jenkins Act: "After a long journey to get to this day, this bill is a win for law enforcement, retailers, and state sale tax advocates.").

[191] 15 U.S.C. § 375 (2012). Of greatest concern to Indian Nations, § 375 of the PACT Act gives revised definitions for certain terms including (but not limited to) "cigarette," *id.* at § 375(2), "person," *id.* at § 375(10) and "use," *id.* at § 375(14). It also expands upon the definition of "interstate commerce" to include commerce "between points in the same State, but through any place outside the State or through any Indian country." § 375(9)(a) –(b). Section 375(5)–(6) introduce and define the term "delivery sale" and "delivery seller." *Id.* Also, it should be noted that the PACT Act expanded its scope to include not only cigarettes, but smokeless tobacco as well. *Id.*

[192] 15 U.S.C. § 377 (2012). Section 377 of the PACT Act covers penalties for "persons," defined at § 375(10), failing to properly implement the Act, or who violate or aid persons who are knowingly in violation of the Act. Increased from the Jenkins Act, civil fines for first time "delivery seller" violations are the greater of $5,000 for first violations and $10,000 for subsequent violations, or 2 percent of the gross tobacco sales of the delivery seller, made within 1-year of the violation. § 377(b)(1)(A)(i)-(ii). Common carriers or other delivery service will be fined $2,500 for first violations, or $5,000 for any subsequent violations within 1 year of a prior violation. *See* § 377(b)(1)(B).

[193] As the strongest and most inclusive piece of legislation to date which explicitly addresses the state's ability to tax cigarette and other tobacco sales made by Indian vendors to non-Indians, and which permits states the authority to unilaterally enforce such provisions, the PACT Act was supposed to solve the New York cigarette taxation enforcement conflict once and for all—but that did not happen. Instead, a zero-sum game over sovereignty, in which a gain for one party decreases the acknowledged sovereignty of the other, has resulted between the State of New York and members of the Seneca Nation.

of their shipments being seized by the state, or their members charged with felonies simply for carrying out the nation's economic business. Under the new terms of the PACT Act, this fear is not unfounded.

If nation-to-nation tobacco trade is "interstate commerce" under the PACT Act, as New York believes, and, if Indian nation governments and their members under the PACT Act are "delivery sellers," then it follows that Indian nations under the PACT Act may have a difficult time circumventing roadblocks to nation-to-nation trade as proscribed by state law, and enforced by federal statutes. Similar to regulations under the Jenkins Act, the PACT Act requires Indian nations and Indian vendors to comply with registration guidelines for all Indian tobacco businesses.[194] This includes adherence to reporting requirements to state tax administrators regarding Indian vendor sales,[195] transportation regulations for shipments of all cigarettes and smokeless tobacco,[196] and state stamping (i.e. taxation) requirements.[197] However, unlike the Jenkins Act, the PACT Act subjects noncompliant Indian vendors to both civil *and* criminal penalties for failing to meet the Act's requirements. [198]

B. Attea, *and its Aftermath: A Contemporary Jurisdictional Framework*

The modern-day jurisdictional framework housing the dispute over state taxation of Seneca tobacco sales to non-Indians on reservation land reflects both a controversy over competing claims of Indian sovereignty, and state complaints of unfair competition that are entrenched in both politics and economics.[199] Within this controversy, Indian nations are subject to the

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[194] 15 U.S.C. § 376. (2012).

[195] *Id.* at § 376(a)(2).

[196] *Id.* at § 377.

[197] *Id.*

[198] *See supra* note 192 and accompanying text.

[199] Sharon E. Claassen, *Taxation: State Transaction Privilege Tax: An Interference with Tribal Self-Government*, 7 AM. INDIAN L. REV. 319, 321 (1979) ("On one side are the Indians, subject to the plenary power of Congress. On the other side are the states, anxious to control what transpires within their borders and to raise revenues from whatever source they can. There is currently strong Indian resistance to any state effort to exert control over or to tax non-Indians doing business with the Indians. There is an equally strong effort by the states to fill with state laws any void existing by virtue of Congress' failure to enact governing legislation. Between them stand the courts, hampered by Congressional inaction on the subject.") (quoting Mescalero Apache Tribe v. O'Cheskey, 493 F. Supp. 1063, 1074 (D.N.M. 1977).

plenary power of Congress—however, states wishing to raise revenues in any way they can often attempt to fill voids left by congressional inaction by passing their own state laws and regulations.[200] This places courts in the middle of the tobacco tax dispute between states and Indian nations, often with little input or guidance from Congress on the subject.[201]

1. *Setting the Stage: Supreme Court Decisions that Paved the Way for* Attea

The Supreme Court cases leading up to *Attea* did little to provide any concrete answers on how courts should solve the dilemma between states and Indian nations over state taxation of tobacco sales made to non-Indians on reservation land. However, in the 1960's, the Supreme Court began to establish general boundaries on states' taxation authority. In 1965 the Supreme Court decided *Warren Trading Post Co. v. Arizona State Tax Commission*,[202] in which it struck down a two percent tax[203] levied on a trading post company that was federally licensed by the United States Commissioner of Indian Affairs as a retail trader on part of the Navajo Reservation.[204] The Court found that the tax was preempted by a federal regulation,[205] and that by taxing Warren, the state had encroached upon the federal government's exclusive oversight of Indian trade.[206] Essentially, the Court in *Warren* held that in the presence of existing federal regulations, the state was without any duties or responsibilities on Indian lands, and as such could not levy a sales tax on a federally licensed trading post that did business with Navajo members.[207] The Court decided the case on the issues,

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[200] *Id.*

[201] *Id.*

[202] Warren Trading Post Co. v. Ariz. St. Tax Comm'n, 380 U.S. 685 (1965).

[203] *Id.* at 692 (unanimously reversing a decision by the Arizona Supreme Court which had upheld the tax).

[204] *Id.* at 686 (noting Warren's argument that taxing revenue derived from his federally licensed trade with the Indians was unconstitutional under the Indian Commerce Clause and thus "inconsistent with the comprehensive congressional plan . . . to regulate Indian trade and traders and to have Indian tribes on reservations govern themselves.").

[205] *Id.*

[206] *Id.* (Indian treaties with the United States "contemplate[d] the Indian territory as completely separate from that of states", giving the federal government exclusive dealings with the tribes) (quoting Worchester v. Ga., 31 U.S. (6 Pet.), 515, 566–57 (1832)).

[207] *Id.* at 688, 689 (explaining the history of federal regulation of Indian traders, Justice Black stated that "[s]uch comprehensive federal regulations of Indian traders has

however, and thus never reached the more complex question of whether the state tax was prohibited by the Indian Commerce Clause.[208]

Five years later, the Supreme Court revisited the question over the limits of state authority to tax members of Indian nations in *McClanahan v. Arizona State Tax Commission*.[209] The specific question before the Court in *McClanahan* was whether the state of Arizona could levy a personal income tax on a Navajo reservation Indian whose income came solely from her work on the Navajo Nation.[210] The Court held that the tax on McClanahan was impermissible because it was preempted by treaties between the U.S. government and the Navajo Nation.[211] The state tax was consequently found by the Court to have impermissibly meddled into an area that was "the exclusive province of the Federal Government and the Indians themselves."[212] This reinforced the sentiment in *Warren* that state infringement into matters involving Indian commerce would not be tolerated.[213]

Regardless of any similarity to the Court's opinion in *Warren*, the Court in *McClanahan* made clear that its holding was narrow.[214] The Court accordingly did not make any statements about the rights of individual American Indians as a result of their native ancestry, but rather limited the scope of its opinion to principles currently found within the framework of tribal sovereignty.[215] The *McClanahan* opinion acknowledged the Court's

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continued from that day to this," and that federal legislation and regulation "would seem in themselves sufficient to show that Congress has taken the business of Indian trading on reservations so fully in hand that no room remains for state laws imposing additional burdens upon traders.") (citing Act of July 22, 1790, 1 Stat. 137).

[208] 380 U.S. 685, 686; *see also id.* at 690 (explaining that in making their decision, the Supreme Court considered the unique history of the Navajo Reservation, noting that the Navajo had been operating their affairs without state interference, "which has automatically relieved Arizona of all burdens of carrying on in those same responsibilities.").

[209] McClanahan v. Ariz. St. Tax Comm'n, 411 U.S. 164, 165 (1973).

[210] *Id.*

[211] *Id.* at 173. *See also id.* at 175 (following the interpretation in *Warren* of a Treaty between the U.S. and the Navajo Nation which read the Treaty "to preclude extension of state law—including state tax law—to Indians on the Navajo Reservation.).

[212] *Id.* at 165.

[213] *Id.* at 175.

[214] *Id.* at 167-68 (noting upfront that the case before the court only involved reservation Indians who "possess the usual accoutrements of tribal self-government," and that the court was not addressing the issue of non-Indians on reservation land, or Indians on non-Indian land).

[215] 411 U.S. 164, 167-68.

consideration of the evolving doctrine of tribal sovereignty, and the changes it had endured since *Worcester*—noting how any "notions of Indian sovereignty [had] been adjusted to take account of the State's legitimate interests in regulating the affairs of non-Indians."[216] This statement foreshadows a shift in jurisprudence by the Court from inherent Indian sovereignty, to federal pre-emption.[217]

On the same day the Supreme Court decided the *McClanahan* case, it also heard *Mescalero Apache Tribe v. Jones*.[218] In *Mescalero*, the question before the Court was whether the following taxes were permissible: (1) a New Mexico tax on the gross receipts of a ski resort owned by the Mescalero Apache tribe, but located and operated on non-reservation land, and (2) a use tax on ski lifts bought by the Mescalero Apache from out of state for use in the resort.[219] The Court upheld the gross receipts tax,[220] finding that by operating off reservation boundaries, the Mescalero Apache subjected themselves to "the same nondiscriminatory state law otherwise applicable to all citizens of the state."[221] However, because property tax is prohibited under the Federal Indian Rights Act, the Court held that New Mexico could not apply a use tax on the ski lifts.[222] Accordingly, the Court in *Mescalero* attempted to stay away from generalizations about inherent Indian sovereignty, and instead adhered to a federal pre-emption analysis it supported in *McClanahan*.[223]

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[216] *Id.* at 171.

[217] *Id.* at 172 (noting that "the trend has been away from the idea of inherent Indian sovereignty as a bar to state jurisdiction and toward reliance on federal pre-emption," but that the principle of Indian sovereignty is still important "because it provides a backdrop against which the applicable treaties and federal statutes must be read.").

[218] Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973).

[219] *Id.* at 146–47.

[220] *Id.* at 157–58.

[221] *Id.* at 148–49 (noting that "[a]bsent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to non-discriminatory state law otherwise applicable to all citizens of the State.").

[222] *Id.* at 158 (stating that the ski lift on the tribe's property and the "use of permanent improvements upon land is so intimately connected with the use of land itself that an explicit provision relieving the latter of state tax burdens must be construed to encompass an exemption for the former.").

[223] *See id.* at 148 (noting that "[g]eneralizations on this subject have become particularly treacherous."). *See also id.* (reiterating the Court's opinion in *McClanahan*, that "in the special area of state taxation, absent cession of jurisdiction or other federal statutes permitting it, there has been no satisfactory authority for taxing Indian reservation lands or Indian income from activities carried on within the boundaries of the reservation . . . .").

In *Moe v. Confederated Salish & Kootenai Tribes of the Flathead Reservation*,[224] the Supreme Court departs from the *McClanahan*[225] and *Mescalero*[226] tradition of looking for guidance in the principle of inherent Indian sovereignty.[227] In *Moe*, the Court upheld a ruling by the U.S. District Court for the District of Montana that found it permissible for states to impose taxes on the non-Indian purchaser of cigarettes bought on Indian land.[228] Accordingly, the Court found that states may "require a precollection of the tax imposed by law upon the non-Indian purchaser of the cigarettes."[229]

The Court's analysis focused on the state's interest collecting a lawful tax, and the nature of the competitive advantage enjoyed by Indian sellers operating on Indian reservations.[230] Specifically, the Court found that because it is unlawful for state citizens to not pay the tobacco tax, "the competitive advantage which the Indian seller doing business on tribal land enjoys over all other cigarette retailers, within and without the reservation, is dependent on the extent to which the non-Indian purchaser is willing to flout his legal obligation to pay the tax."[231] Further, the Court found that Montana's taxation scheme did not frustrate self-government by Indian nations, nor did it "run afoul of any congressional enactment dealing with the affairs of reservation Indians."[232] *Moe* thus appears to have set a precedent

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[224] Moe v. Confederated Salish & Kootenai Tribes of the Flathead Reservation, 425 U.S. 463 (1976) (concerning the case of Joseph Wheeler, a member of the Confederated Salish and Kootenai tribes and operator of a retail tobacco store located on reservation land, who was arrested along with his Indian employees and charged with the misdemeanors of selling non-tax-stamped cigarettes, and operating while failing to possess a valid cigarette retailer licenses).

[225] McClanahan v. Ariz. State Tax Comm'n, 411 U.S. 164, 165 (1973).

[226] Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973).

[227] 425 U.S. at 466–69 (detailing the history of the Flathead Reservation and the Confederated Salish and Kootenai tribes in Montana, Justice Rehnquist mentions relevant federal treaties and statutes, but leaves out the principle of tribal sovereignty guiding the Court's jurisprudence in *McClanahan* and *Mescalero*).

[228] *Id.* at 483.

[229] *Id.* at 468.

[230] *Id.* at 481.

[231] *Id.* at 482.

[232] *Id.* at 483. *See id.* (finding that Montana may require "the Indian tribal seller [to] collect a tax validly imposed on non-Indians" because it is a "minimal burden designed to avoid the likelihood that in its absence non-Indians purchasing from the tribal seller will avoid payment of a concededly lawful tax."); *id.* at 482 (distinguishing this case from *Warren*, in that that the tax at issue in *Warren* was a gross income tax imposed directly

elusively permitting states to require Indian nations to collect a tobacco tax against non-Indian consumers; however, to what extent a state may burden an Indian nation for this purpose, and what this says about Indian sovereignty, still remains unclear.

In *Washington v. Confederated Tribes of the Colville Reservation*,[233] the Supreme Court attempted to clarify its holding in *Moe* by reducing *Moe* to three core principles, and then upholding each of them: First, the Court held that "states may sometimes impose a nondiscriminatory tax on non-Indian customers of Indian retailers doing business on the reservation."[234] Second, the Court found that requiring Indian retailers to collect a tax from non-Indian purchasers on Indian land "may be valid even if it seriously disadvantages or eliminates the Indian retailer's business with non-Indians."[235] Finally, the Court found that states "may impose at least 'minimal' burdens on the Indian retailer to aid in enforcing the tax."[236]

The Court declared the right of Indian tribes to impose their own taxes on cigarettes to be a "fundamental attribute of Indian sovereignty,"[237] which "is dependent on, and subordinate to, only the Federal Government, not the states."[238] Yet, in the same opinion, the Court qualified its statement by declaring that "[t]he principle of tribal self-government, grounded in notions of inherent sovereignty and in congressional policies, seeks an accommodation between the interests of the Tribes and the Federal Government on one hand, and those of the State, on the other."[239] Accordingly, when the Court applied the three principles outlined in *Moe*, it attempted to balance Washington's state interests with the interests of the Confederated Tribes of the Colville Reservation.[240]

Under the *Colville* balancing test, the interests of Indian nations are the strongest when the tax being levied is "derived from value generated on the reservation by activities involving Tribes, and when the taxpayer is the recipient of Tribal services."[241] Conversely, the state's interest is the

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upon the Indian seller, whereas in the case at hand, the tax burden is on the non-Indian purchaser.).

[233] Wash. v. Confederated Tribes of the Colville Reservation, 447 U.S. 134 (1980).

[234] *Id.* at 151.

[235] *Id.*

[236] *Id.*

[237] *Id.* at 152.

[238] *Id.*

[239] Wash. v. Confederated Tribes of the Colville Reservation, 447 U.S. 134, 156 (1980).

[240] *Id.* at 156–57.

[241] *Id.*

strongest when "the tax is directed at off-reservation value, and when the taxpayer is the recipient of state services."[242] In *Colville*, the State of Washington was found to have an especially strong interest because the tax was being applied to non-Indians who were not the beneficiaries of tribal services.[243] Thus, while the *Colville* Court clarified the principles in *Moe* without departing from *Moe*'s reasoning,[244] the Court's use of a balancing test suggested the Court would look at the issue of state taxation of Indian tobacco sales to non-Indians on Indian land on a case by case basis.

Eleven years later, the Supreme Court affirmed its conclusions from *Moe* and *Colville* in *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma*[245] when it held that states may tax on-reservation cigarette sales to non-Indians.[246] However, unwilling "to modify the long-established principle of sovereign immunity,"[247] the Court held that states were barred from suing Indian tribes to enforce its taxes,[248] even though it found that the principle of sovereign immunity "does not excuse a tribe from all obligations to assist in the collection of validly imposed state sales taxes."[249]

Thus, in the cases leading up to *Attea*, the Supreme Court's jurisprudence established a precedent whereby states have the authority to tax Indian tobacco sales to non-Indians on Indian land, but where states are barred by the principle of sovereign immunity from suing incompliant Indian nations to enforce its tax.

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[242] *Id.* at 157.

[243] *Id. See id.* at 162 (finding Washington's interest to be so strong that the state was justified in seizing unstamped cigarettes being transported to an Indian reservation to be sold so long as the cigarettes were seized outside the reservation "where state power over Indian affairs is considerably more expansive than it is within reservation boundaries.").

[244] *See id.* at 159 (noting that the State of Washington's tax collection burden was "legally indistinguishable" from Montana's tax in *Moe*).

[245] Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla., 498 U.S. 505 (1991).

[246] *Id.* at 507.

[247] *Id.* at 510 (rejecting Chief Justice Marshall's argument in *Cherokee Nation* that Indian tribes are domestic dependent nations whose sovereign immunity "impermissibly burdens the administration of state tax laws" and should accordingly be restricted to the "internal affairs of the tribe.").

[248] *Id.* (writing for the majority, Chief Justice Rehnquist held that "under the doctrine of tribal sovereign immunity, the State may not tax such sales to Indians, but remains free to collect taxes on sales to nonmembers of the tribe.").

[249] *Id.* at 512 (citing Wash. v. Confederated Tribes of Colville Reservation, 447 U.S. 134 (1980)).

2. *New York's Tobacco Tax Scheme and Seneca Defiance:* Attea *in State Court*

In the wake of *Moe*, New York was busy creating new tobacco tax scheme.[250] In 1998, the New York Department of Taxation and Finance created regulations that limited the quantity of unstamped cigarettes wholesalers could sell to Indian nations and Indian retailers.[251] Under its 1988 regulations, the quantity of unstamped cigarettes allotted for sale by wholesalers to Indian nations and retailers depended upon the Indian nation's "probable demand."[252]

The validity of New York's new taxing scheme was immediately challenged by Milhelm Attea Bros., Inc. [253]—a non-Indian operated cigarette wholesaler business that made much of its profits from sales to Indian nations.[254] Relying on the Supreme Court's reasoning in *Warren*, Attea argued that New York's taxation scheme was preempted by federal statutes controlling Indian trade.[255] In particular, Attea pointed to 25 U.S.C. § 261 (2006) in which the FBI could authorize wholesalers to sell cigarettes to Indians on reservations.[256] The New York Appellate Division initially came down on the side of the wholesalers—however, in the aftermath of its decision in *Potawatomi*,[257] the Supreme Court granted certiorari and remanded its decision.[258] During its second appearance before the New York Appellate Division, the court held that 25 U.S.C. § 261 did not preempt the New York's tobacco taxation scheme, and that accordingly the scheme was constitutional.[259] The Appellate Division distinguished *Attea* from *Moe* and *Colville* in that New York's tax regulations *only* applied to sales made by non-Indian wholesalers.[260]

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[250] *See* Cayuga Indian Nation of N.Y. v. Gould, 930 N.E.2d. 233, 235 (N.Y. 2010).

[251] *See id.* at 235.

[252] *See id.*

[253] Dep't of Taxation and Fin. of N.Y. v. Milhelm Attea & Bros., Inc., 512 U.S. 61 (1994).

[254] *See Cayuga*, 930 N.E.2d. at 235–36.

[255] 512 U.S. at 67–68.

[256] 25 U.S.C. § 161 (2006). *See Attea*, 512 U.S. at 68.

[257] Citizen Band Potawatomi Indian Tribe of Oklahoma, 498 U.S. 505 (1991).

[258] Milhelm Attea & Bros., Inc. v. Dep't of Taxation and Fin. of N.Y., 585 N.Y.S.2d 847, 849 (App. Div. 1992), rev'd, 615 N.E.2d 994 (N.Y. 1993), rev'd 502 U.S. 1053 (1992).

[259] 615 N.E.2d at 994.

[260] Dep't of Taxation and Fin. of N.Y. v. Milhelm Attea & Bros., INC., 512 U.S. 61, 68 (1994).

Seneca protestors quickly flocked to the New York State Thruway, blocking any outside traffic from passing through Seneca lands.[261] The protest quickly escalated as some members of the Seneca Nation began lighting tires on fire and throwing debris.[262] A violent confrontation between Seneca Indians and New York State troopers erupted, injuring people on both sides of the protest.[263] The protests finally came to an end after the New York Court of Appeals issued an injunction on the enforcement of the tax scheme.[264] It was not long before *Attea* found itself before the Supreme Court.[265]

3. *The Supreme Court's Decision in* Attea

Not long after the creation of tax regulations by the New York Taxation Department, the department "determined that a large volume of unstamped cigarettes was being purchased by non-Indians from reservation retailers."[266] To prevent this form of tax evasion, the "regulations limit[ed] the quantity of untaxed cigarettes that wholesalers may sell to tribes and tribal retailers."[267] The regulations also provided that absent any agreement between the Indian nation and the state, "the Department itself [will limit] the determined quantity of untaxed cigarettes based on the 'probable demand' of tax-exempt Indian consumers."[268]

Thus, the question before the Supreme Court in *Attea* was "[w]hether New York's regulations were pre-empted by federal statutes governing trade

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[261] Robert Odawi Porter, *Tribal Disobedience*, 11 TEX. J. C.L. & C.R. 137, 158 (2006) [hereinafter *Tribal Disobedience*].

[262] *Senecas Clash, supra* note 7. *See also* Tribal Disobedience, *supra* note 262 at 159.

[263] *Tribal Disobedience*, *supra* note 262, at 159.

[264] James Dao, *Ruling Scuttles Plan To Collect Taxes on Reservation Sales*, N.Y. TIMES, Jun. 11, 1993, http://www.nytimes.com/1993/06/11/nyregion/ruling-scuttles-plan-to-collect-taxes-on-reservation-sales.html?scp=8&sq=%22attea%22&st=nyt.

[265] *See* 512 U.S. at 61.

[266] *Id.* at 64–65.

[267] *Id.* at 65.

[268] *Id.* at 66. (detailing that the Department would calculate "probable demand" by relying on evidence produced by the Indian nations, or by its own math, and that "[e]ach sale of untaxed cigarettes by a wholesaler to a tribe or reservation must be approved by the Department." Retailers would then be "sent 'Tax Exemption Coupons' entitling them to their monthly allotment of tax-exempt cigarettes." The Department would also have the authority to "without approval of deliveries to tribes or retailers and may cancel the exemption certificates of noncomplying tribes or retailers.").

with the Indians," in particular, 25 U.S.C. § 261.[269] Justice Stevens authored the opinion, noting upfront that the opinion was only answering a facial challenge to New York's tobacco tax scheme.[270] Justice Stevens wrote that the Court was unwilling to extend its holding any further than "the narrower question whether the New York scheme is inconsistent with [25 U.S.C. § 261]."[271] Reiterating the analysis in *Moe*,[272] the Court applied a balancing test to the state's interest in regulating the activities within its own borders by its people, and the interest by Indian nations in tribal autonomy.[273] After balancing these competing interests, the Court found that the state's "valid interest in ensuring compliance with lawful taxes . . . leaves more room for state regulation than in others." The Court relied on prior precedent in "decid[ing] that States may impose on reservation retailers minimal burdens reasonably tailored to the collection of valid taxes from non-Indians." According to the Court, it followed that "[25 U.S.C. § 261 does] not bar the States from imposing reasonable regulatory burdens upon Indian traders . . . who are not wholly immune from state regulation that is reasonably necessary to the assessment or collection of lawful state taxes."[274]

The Supreme Court's decision in *Attea* did not determine whether the mechanisms used in the New York tax scheme are *always* constitutionally

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[269] *Id.* at 64.

[270] *Id.* at 69 (limiting the scope of the Court's opinion required the court to make the following assumptions: (1) that "the allocations for each reservation will be sufficiently generous to satisfy the legitimate demands of those reservation Indians who smoke cigarettes," (2) that the Court's decision would be confined "to those alleged defects that inhere in the regulations as written," and (3) that while the adverse effects of New York's scheme "may be relevant. . . this case does not require [the Court] to assess for all purposes each feature of New York's tax enforcement scheme that might affect tribal self-government or federal authority over Indian affairs.").

[271] 512 U.S. at 70.

[272] *Id.* at 64 (reiterating the Court's holding in *Moe* by stating that "because New York lacks authority to cigarettes sold to tribal members for their own consumption, cigarettes to be consumed on the reservation by enrolled tribal members are tax exempt and need not be stamped."). *But see*, *id.* at 71 (noting that cases like *Moe* limited the language in *Warren* which most likely would have found 25 U.S.C. § 286 to preempt state interference.); *id.* (reiterating its findings in *Colville* that "the Tribes had failed to meet their burden of showing that the record keeping requirements . . . were "not reasonably necessary as a means of preventing fraudulent transactions," which the state had a valid interest in preventing.).

[273] *Id.* at 72 (noting that "this is a conflict whose resolution does not depend on ridged concepts but instead on a particularized inquiry into the facts.").

[274] *Id.* at 74–75.

permissible.[275] Rather, the Court acknowledged the possibility of future problems while encouraging the State Taxation Department and individual Indian nations to "address or resolve problems that are now purely hypothetical."[276] Yet while Supreme Court handed down another opinion specifically tailored to the facts before it, New York hailed the Supreme Court's ruling *Attea* as a major victory for the state.[277] This victory, however, would be short-lived.

4. *The Aftermath of* Attea

While New York saw great promise for resolution immediately following *Attea*,[278] conflict and confusion quickly resumed. After *Attea*, the department declared it was going to begin its enforcement of tax collection as soon as it "finalize[d] the plan's technical details."[279] However, multiple delays arose,[280] and all negotiations between the department and New York's Indian nations failed.[281]

When the department finally announced its plan late February 1996 to begin enforcement of its tax scheme on Indian nations starting July 5th,[282] Indian nation leaders vowed to fight the enforcement.[283] Approaching the

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[275] *Id.* at 76 (admitting that future problems may arise with the application of the New York tax scheme and that problems such as "unduly burdensome" procedure "absent wrongful withholding or delay of approval . . . can be addressed if and when they arise").

[276] *See id.* at 77–78.

[277] *See e.g.*, Linda Greenhouse, *New York Sees Tax Windfall in Indian Sales*, N.Y. TIMES, June 14, 1994, http://www.nytimes.com/1004/06/14/nyregion/new-york-sees-tax-winfall-in-indian-sales.html?scp=11&sq=%22attea%22&st=nyt.

[278] *See id.*

[279] *See* N.Y. Ass'n of Convenience Stores v. Urbach, 699 N.E.2d 904, 908 (N.Y. 1998) (holding that New York's forbearance policy did not constitute a racial classification subject to strict scrutiny against non-Indian convenience store owners); Michel P. Cassier & Andrew B. Sabol, *State Taxation*, 49 SYRACUSE L. REV. 729, 766 (1999) (noting that the implementation of the Department's proposed regulations was postponed until an opinion was issued in *Urbach*).

[280] *See* Cassier & Sabol, *supra* note 279.

[281] *See* Cayuga Indian Nation of N.Y. v. Gould, 930 N.E.2d 233, 237 (N.Y. 2010) (mentioning the failed negotiations between New York and its Indian nations).

[282] Jon R. Sorensen, *State to Collect Levies on Reservation-Bound Cigarettes, Gas*, BUFFALO NEWS, Feb. 25, 1996, hittp://highbeam.com/doc/1P2-22836598.html.

[283] Susan Schulman, *Leaders Vow to Fight Proposal Tax on Gasoline, Cigarettes*, BUFFALO NEWS, Feb. 25, 1996, http://www.highbeam.com/doc/1P2022837345.html

July 5th deadline, hundreds of American Indian protesters flocked to the New York State capitol in Albany, prompting Governor George Pataki to lift the July enforcement date.[284] After another round of tepid negotiations ended up in a stalemate,[285] Pataki announced an interim compromise in which Indian nations would apply their own taxes on non-Indian tobacco sales at a rate lower than that of the state.[286] While four of New York's Indian nations agreed to the Governor's offer,[287] the four other Indian nations—including the Seneca Nation—who represented the largest shares of on-reservation tobacco sales, declined.[288] The department responded by ordering wholesalers to cease all shipments of tobacco products to the declining Indian nations,[289] which resulted in a repeat of the 1992 blockade of the New York State Thruway.[290]

The Governor and the Department responded by continuing to practice a policy of forbearance.[291] However, in 2003 the New York State legislature adopted Tax Law 471-e, ordering the department to adopt regulations on the taxation of non-Indian tobacco sales to non-Indians on reservations.[292] The department responded to the legislature's request by drafting regulations, but never moved to adopt them.[293] Lacking department action, forbearance ensued.[294]

(reporting on a summit attended by over 200 Indian leaders and officials vowing to fight New York's enforcement efforts).

[284] Karen L. Folster, Comment, *Just Cheap Butts, or an Equal Protection Violation?: New York's Failure to Tax Reservation Sales to Non-Indians*, 62 ALB. L. REV. 697, 705 (1998).

[285] *Id.* at 706.

[286] *Id.*

[287] *Id.* at n.82 (noting that the Onondaga, Oneida, Tuscarora, and Cayuga Nations all agreed to Governor Pataki's interim compromise).

[288] Raymond Hernandez, *In a Shift, New York Won't Try to Tax sales on Indian Lands*, N.Y. TIMES, May 23, 1997, http://www.nytimes.com/1997/05/22/nyregion/in-a-shift-new-york-won-t-try-to-tax-sales-on-indian-lands.html.

[289] Folster, *supra* note 285, at 707.

[290] William Glaberson, *Trying To Unite Fractured Tribe While Fighting State over Taxes*, N.Y. TIMES, Apr. 22, 1997, http://bytimes.com/1997/04/22/nyregion/trying-to-unite-fractured-tribe-while-fighting-state-over-taxes.html?scp=1&sq=seneca&st=nyt.

[291] Hernandez, *supra* note 289 (reporting that on May 22, 1997, Governor Pataki officially announced that the State would end its enforcement of the Department's tax scheme, and instead would practice a policy of forbearance).

[292] 2003 N.Y. Sess. Laws 579 (McKinney).

[293] *See Cayuga*, 930 N.E.2d at 238.

[294] *See id.*

In 2005, the State legislature responded to the department's lack of action with an amendment to 471-e which incorporated of the department's 2003 proposed regulations.[295] Tax Law 471-e now provided that "non-Indians making cigarette purchases on an Indian reservation shall not be exempt from paying the cigarette tax when purchasing cigarettes within this state."[296] The amended tax law was challenged by a tribal retailer in *Day Wholesale, Inc. v. State*,[297] who initiated an action for declaratory judgment against state enforcement of the 471-e amendments.[298] Finding the 471-e amendments to have provided insurance of Indian tax exemption coupons, the Appellate Division enjoined the enforcement of 471-e.[299]

This was the environment within which the New York Court of Appeals decided *Cayuga Indian Nation of New York v. Gould* in 2010.[300] But in light of the Appellate Division's upholding of the Tax law 471-e amendments, the Court of Appeals in *Cayuga* held that there was "no enforceable statutory or regulatory scheme specifically addressing the calculation and collection of taxes arising from the on-reservation sale of cigarettes."[301] "In absence of a methodology developed by the state that respects the federally protected right to sell untaxed cigarettes to members of the Nation while at the same time providing for the calculation and collection of the tax relating to retail sales to non-Indian consumers,"[302] the Court of Appeals held that taxes could not be collected on reservation sales to non-Indians.[303] However, the Court of Appeals urged New York to create a "specialized mechanism" to calculate taxation rates for Indian nations while at the same time remaining sensitive to the needs of its Indian nations.[304]

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[295] *See* 2005 N.Y. Sess. Laws 461.

[296] *Id.* (adopting a "probable demand mechanism and a coupon system mirroring the 1988 regulations"). *See Cayuga*, 930 N.E.2d at 239 (noting that in 471-e the Department does not say how probable demand is to be calculated, or what rules are required for the regulations proper implementation and enforcement).

[297] Day Wholesale, Inc. v. State, 856 N.Y.S.2d 808, 808 (N.Y. App. Div. 2008).

[298] 856 N.Y.S.2d. at 808.

[299] *Id.* at 810 (concluding that such provisions are effective only when "[a]t minimum, the actions, rules and regulations necessary for the implementation of the statutory scheme include the issuance of Indian tax exemption coupons).

[300] Cayuga Indian Nation of New York v. Gould, 930 N.E.2d 233, 239–49 (N.Y. 2010).

[301] *Id.* at 239–40.

[302] *Id.* at 253.

[303] *Id.*

[304] *See id.* at 254.

Yet, while the Supreme Court was deciding *Cayuga*, the department revoked its policy of forbearance,[305] and the New York State legislature successfully enacted amendments to Tax Law 471-e, which included the required provisions and a tax exemption coupon system.[306] On June 22, 2010, the department adopted an emergency rule to enforce these amendments.[307] The department also moved to lift the preliminary injunction in place from the 2008 *Day Wholesale*[308] litigation, arguing that their new system satisfied all of the requirements set forth in *Cayuga*.[309] The district court denied the department's motion due to the "irreparable injury absent a stay" that would be inflicted upon New York's Indian nations, and which could "not be remedied by damages."[310] On December 9, 2010, the Second Circuit denied the State's motion to lift the district court's stay.

IV. NEGOTIATING AROUND THE ZERO-SUM: FOCUSING ON DISCOVERING INTERESTS UNDERLYING BOTH PARTIES' UNYIELDING SOVEREIGNTY POSITIONS

Throughout the history of the United States, interactions between the federal government, states, and Indian nations have provided the American legal system with a working definition of "Indian sovereignty."[311]

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[305] Affidavit in Support of Plaintiffs' Application for a Temporary Restraining Order and Plaintiffs' Motion for a Summary Judgment at 10 (statement of Peter Day, President of Day Wholesale, Inc.), Day Wholesale Inc. et al. v. Seneca Nation of Indians, 2006 WL 6627285 (N.Y.Sup.).

[306] *Id.* at 11.

[307] *Id.*

[308] *See* Dan Herbeck & Aaron Besecker, *State Relents After Ruling on Cigarette Tax*, BUFFALO NEWS, Sept. 2, 2010, http://www.buffalonews.com/city/article178397.ece.

[309] *See* Affidavit in Support of Applicants' Application for a Temporary Restraining Order and Summary Judgment, *supra* note 306, at 12.

[310] Seneca Nation of Indians v. Paterson, No. 10-CV-687A (W.D.N.Y. Oct. 14, 2010), *available at* http://docs.justia.com/cases/federal/district-courts/new-york/nywdce/1:2010cv00687/804, at 4–5 (finding that "[a]proximately 3,000 people are currently employed by the Seneca Nation's 172 tobacco retailers," and that "[t]he potential loss of an entire economy that currently supports many of each Nation's members and services is a harm that cannot be measured in monetary damage alone."); *id.* at 6 (noting New York's "dramatic shift" from practicing a policy forbearance to aggressive enforcement, and stating that "the Court does not believe that the minimum additional delay pending appeal will cause substantial injury [to the state], particularly when weighed against the potential irreparable harm to the Nations' tobacco economies.").

[311] *Supra* Sections II and III.

Accordingly, the federal government, states, and even some Indian nations, have looked to the meaning of Indian sovereignty in American jurisprudence in its efforts to define legal boundaries in the tobacco tax dispute.[312] However, these efforts—which essentially ask the court to pick the "correct" interpretation of "Indian sovereignty" from two competing versions which both claim to be properly rooted in American jurisprudence—are not working for the State of New York and the Seneca Nation. Instead, the process has failed to produce any resolution in the longstanding tobacco tax conflict between the two parties.

A zero-sum litigation process is likely to blame for the stalemate. The current process threatens the positions and interests of both parties in preserving sovereignty. At the same time, the current process unfortunately overlooks the potential of overlapping interests to further create options for mutual benefit. In response to the past legislative and litigious failures to resolve the dispute, Section IV proposes an alternative process whereby both parties engage in *good-faith* negotiations over party interests independent of their positions on each other's respective sovereignty. In this imagined alternative, both parties are free to consider their dynamic—and arguably more flexible—interests independent of their uncompromising positions on sovereignty.

A. *The Current Dispute Resolution Model and its Alternatives*

In light of the Supreme Court's finding in *Attea* that the State of New York can lawfully tax Seneca tobacco sales to non-members,[313] the Seneca

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[312] *Supra* Sections II and III.

[313] Dep't of Taxation and Fin. of N.Y. v. Milheim Attea & Bros., Inc., 512 U.S. 61, 61 (1994); *see* James Fink, *Tobacco Tax Ruling Fails to Deter Seneca Nation,* THE BUFF. L.J., Jun. 23, 2011, http://www.lawjournalbuffalo.com/news/article/current/2011/06/23/103225/tobacco-tax-ruling-fails-to-deter-seneca-nation (noting how in response to the Supreme Court's 2011 ruling in *Attea*, Robert Odawi Porter, President of the Seneca Nation, vowed that New York would "never collect a cent of revenue from tobacco sales occurring in [Seneca] territories," and that any future revenue predictions trying to indicate otherwise were "foolishness."). *See also* David Caruso, *Seneca Tobacco Accused of Flouting Law*, THE BUFF. L.J., Jun. 28, 2012, http://www.lawjournalbuffalo.com/news/article/current/2012/06/28/ (describing how in one instance, the state New York filed a federal lawsuit against two members of the Seneca Nation who during a sting operation, were found to have sold cigarettes online without taxing the buyer, verifying the age of the individual receiving the order, or attaching the required surgeon general's health warnings to the products.).

Nation continues to resist paying or collecting any tax on its tobacco sales.[314] In June of 2012, New York demonstrated its own resistance to a legal decision when it refused to comply with a court order from a New York State Supreme Court Judge mandating the State release a shipment of unstamped native brand tobacco products it seized from an Indian nation carrier.[315] This lack of compliance is not surprising when one considers the lack of legitimacy from which the current process suffers.

Under the current process, the New York State Congress enacts a statue, or the appropriate department (i.e. Department of Taxation and Finance) passes a regulation, which defines and/or requires some form of taxation for Indian tobacco sales made on a reservation to non-members. As a way to gain cooperation, the statute or regulation will mandate "lawful compliance" by all citizens—including members of Indian nations within its borders.[316] Despite this official language, precedent suggests members of the Seneca Nation will unlikely comply—claiming instead that the statute violates their

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[314] *See* Caruso, *supra* note 314 (reporting how, in light of New York's lawsuit, Seneca business owners have maintained the position that they did nothing wrong, and that as Seneca members they are exempt from state taxation on tobacco sales). *See also* Fink, *supra* note 314 (noting how Seneca businesses have tried to bypass the Supreme Court's ruling in *Attea* by refusing to selling premium brand cigarettes. Instead, many Seneca retailers have stated selling only Seneca and other "Traditional" or "Native," brands which they say cannot be taxed even under *Attea*.).

[315] *See* Gale Courey Toensing, *Judge: State has 'No Legal Authority' to Seize Untaxed Indian Cigarettes in Out-of-State Sales*, INDIAN COUNTY TODAY, June 22, 2012, http://indiancountrytodaymedianetwork.com/article/judge%3A-state-has-%E2%80%98no-legal-authority%E2%80%99-to-seize-untaxed-indian-cigarettes-in-out-of-state-sales-119936, [hereinafter *State has 'No Legal Authority'*] (reporting that on January 23, 2011, New York Border Patrol officers pulled over truck driven by a member of the Mohawk Nation, and without a warrant broke open the seal on the trucks cargo doors and seized 26,160 cartons of cigarettes owned by the Winnebago tribe of Nebraska, as well as seventy-two bags of loose tobacco that had been purchased from a federally licensed manufacturer on another Indian nation. A New York Supreme Court Judge ruled on June 18, 2012 that New York had no legal authority to seize or hold the untaxed cigarettes because they were "manufactured on Indian land and being sold to an out-of-state reservation," and that New York state police were to immediately return all seized property—which was valued at over two million dollars); *see also* Gale Courey Toensing, *New York State Holds Seized Cigarettes in Defiance of Court Order*, INDIAN COUNTRY TODAY, July 3, 2012, http://indiancountrytodaymedianetwork.com/mobile/article/new-york-state-holds-seized-cigarettes-in-defiance-of-court-order-122006, [hereinafter *New York State Holds Seized Cigarettes*] (noting that as of July 2012, New York and the Cuomo administration remained defiant of the court order, refused to return the seized cargo, and declared that they would "not change their enforcement practices despite the court ruling.").

[316] NY TAX LAW § 471 (McKinney).

sovereign immunity against state taxation.[317] But what the Seneca Nation claims to be a lawful assertion of their "sovereign immunity," New York will fill find to be a "circumvention of a lawful tax."[318]

Under this process, one of two events is likely to occur next: (1) New York may respond to the "tax evasion" by filing a complaint against the noncompliant Seneca members,[319] or (2) Members of the Seneca Nation may file for an injunction against the state to cease attempts by the state to collect the tax.[320] If either compliant is valid the parties will proceed to court. At court, the "winning party"—i.e. the party whose interpretation of their own sovereign capacities is most closely aligned with the court's decision—will lack an incentive to illegitimate the process, and accordingly will comply with the court's orders.[321] However, the winning argument will have relied on a definition of sovereignty that runs afoul of the losing party's beliefs concerning their own sovereignty. Accordingly, absent a willingness to cede sovereignty to the winning party, the losing party is likely label the process illegitimate, and their willingness to comply with the outcome becomes unlikely.[322]

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[317] *Testimony of Robert Odawi Porter President of the Seneca Nation of Indians before the Comm. On Fin. U.S. S. Hearing on Tax Reform: What it Could Mean for Tribes and Territories*, 112th Cong. 2 (2012) [hereinafter Testimony of Robert Odawi Porter] (statement of Robert Odawi Porter, President of the Seneca Nation of Indians).

[318] *See* Tom Precious & Dan Herbeck, *State Sets to get Tax on Indian Cigarette Sales*, BUFFALO NEWS, May 9, 2011, http://www.buffalonews.com/city/police-courts/courts/article417925.ece (quoting Governor Andrew Cuomo: "[T]axes on cigarettes sold to nontribal members must be collected because this is revenue rightly owed to the state, and with this decision, my administration will move to do so expeditiously.").

[319] *See e.g.*, Gale Courey Toensing, *Does the Shadow of Big Tobacco Loom Behind the Recent Seizure of Mohawk Cigarettes?* INDIAN COUNTRY TODAY, June 1, 2012. http://indiancountrytodaymedianetwork.com/mobile/article/does-the-shadow-of-big-tobacco-loom-behind-the-recent-seizure-of-mohawk-cigarettes%3F-115960.

[320] *See* Amended Verified Complaint Seneca Nation of Indians v. The State of New York, et al. , 2011 WL 6951219 (N.Y. Sup.).

[321] *See Executive Refusal: Why the State Has Failed to Collect Cigarette Taxes on Native American Reservations*, 233 Sess. 4 (N.Y. 2010) [hereinafter *Executive Refusal*] *available at http://www.nysenate.gov/files/pdfs/Executive%20Refusal%20FINAL%20June%202010.pdf* (citing *Milhelm Attea & Bros., Inc.* 512 U.S. at 73-78 which upheld New York's state tax exemption coupon system. He justified the legitimacy of the State's coupon system on Indian reservations by noting that "[T]he Supreme Court and other federal courts have upheld efforts by various states to enforce various taxing mechanisms.").

[322] *See* Susan Asquith & Sharon Linstedt, *Seneca Nation Response to New York State Senate Committee Call Sales tax collection on Sales of Native American Tobacco*

Instead, the "losing party" cites its original position as justification for why the court's opinion or court order does not apply to them.[323] The "losing party" must wait until another litigation cycle is initiated in hopes that the court order or opinion will "properly" reflect their position. Only then will the court's opinion be legitimate and its orders binding to them. Consequently, the *status quo* is left intact until one party either decides to give in to the other's demands and forfeit their position—which is highly unlikely—or until one party decides to use violence against the other to force compliance—which is highly undesirable.

While most of the dispute over unilateral state taxation legislation and Seneca Nation noncompliance has been addressed using this litigation process, litigation is not the only method of dispute resolution the parties have utilized. Both parties have previously experimented with alternatives—such as the use of force, practicing forbearance, and attempting some form of negotiation. Each of these alternatives is discussed below to highlight the possible benefits and challenges they might bring to the dispute resolution process. Out of these alternatives, negotiation is introduced as having the potential capacity to bring about mutually-beneficial resolution for the parties, while at the same time preserving their respective positions on sovereignty.

Both parties have the option of using violence or another disruptive act to force or compel the other party to retreat from their initial position and comply with their demands. The Seneca Nation used this tactic twice before when it barricaded the New York State Thruway in 1992 and in 1997.[324] Both times were in response to New York efforts to collect a state tobacco tax.[325] New York officials characterized the events as "violent confrontations on reservation lands [which resulted] in serious personal injury, major

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Products, PR NEWSWIRE (June 11, 2010), http://www.bizjournals.com/prnewswire/press_release/2010/06/11/2012 (quoting Seneca Tribal Council Chair Richard Nephew, in his response to Sen. Johnson's *Executive Refusal*: "It comes down to lawmakers spending a lot of time and money to say once again that the state is in desperate need of new revenue sources and we are targeted as a source. There's nothing new there. We continue to agree to disagree[.] . . . On our side, treaty rights remain as strong as ever and we remain a sovereign nation.").

[323] *See id.* at 1 (citing Richard Nephew's belief that in authoring *Executive Refusal*, *supra* note 321, Sen. Johnson "cite[d] self-serving legal precedent to justify having an subservient government collect taxes."). *See also* Asquith & Linstedt, *supra* note 322 (reporting that Nephew's response to the publication of *Executive Refusal* also expressed frustration with the Chairman to the Standing Committee's recommendation that the state enforce the upheld taxes because doing so would "usurp federal treaty rights").

[324] *See* Lisberg *et al.*, *supra* note 4. *See also Senecas Clash*, *supra* note 7.

[325] *See* Lisberg *et al.*, *supra* note 4. *See also Senecas Clash*, *supra* note 7.

disruptions and threats to public safety."[326] In the wake of the State Thruway incidents, barricade efforts by Seneca Nation members were credited with prompting the suspension of all state tax collection efforts.[327]

There is also always the threat that the Seneca Nation may resort to violence should it become necessary to protect its tobacco economy.[328] This threat was acknowledged by New York officials on September 23, 2009 when former Governor Paterson wrote to the United States Attorneys for the Eastern, Northern and Western Districts of New York to inquire about the possibility and extent of possible violence in the event that tax collection was initiated.[329] While no formal response was given, the Governor was informally advised that tax enforcement at that time would re-ignite violence and carry a heavy financial burden.[330] Accordingly, the State Thruway incidents appear fresh in the memory of New York politicians and representatives who may remain hesitant about sparking future violence.

Both parties also have the option to ignore the dispute and try to maintain the status quo. Considering the benefits of forbearance to both parties, it is not surprising that they have chosen this route before. For the Seneca Nation, forbearance provides one incredibly attractive benefit—it keeps the Nation and its members out of court. Past litigation established unfavorable precedent challenging the Treaty of Canandaigua's language on sovereign exemption. [331] As a result, initiating litigation would be incredibly risky for

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[326] *See Executive Refusal, supra* note 321, at 10.

[327] *See id.* (finding New York's suspension of tax collection efforts to have resulted in forbearance).

[328] *See New York Holds Seized Cigarettes, supra* note 315, at 2 (reporting on the Seneca Nation Council chair Richard Nephew's response to New York's seizure of Native brand tobacco products).

[329] *See id.* at 10.

[330] *See Executive Refusal, supra* note 321, at 10. (citing the testimony of Peter J. Kiernan, Esq, from Oct. 27, 2010, in which Kieman noted that the Governor had been informally advised that all threat assessments conducted by Justice Department would be deferred to State Police. Some estimates made by the New York State Police found daily enforcement costs during the State Thruway conflict to be around $2 million a day.).

[331] *Executive Refusal, supra* note 321, at 6 (citing to the finding in Snyder v. Wetzler, 193 A.D.2d 329 (3rd Dept 1993), aff'd, 84 N.Y.2d 941 (1994) that the Buffalo Creek Treaty "may not be utilized as a basis to preclude sales tax liability or collection."). *See id.* at fn. 26 (citing Briffault's Testimony from Jan. 26, 2010 that "[t]he treaty was plainly intended to prevent recurrence of assessments on land, but it says nothing about and has no bearing on a sales tax which is not a tax on land"). *See also* N.Y. St. Dept. of Taxation & Fin. v. Bramhall, 235 A.D.2d 75, 85 (4th Dep't 1997) (finding the Buffalo Creek Treaty "prohibits the State from taxing reservation land" but "does not bar the imposition of excise and sales tax on cigarettes . . . sold to non-Indians on the Seneca

the Seneca Nation, and would not be entered into lightly. Forbearance policies also provide the State of New York the benefit of avoiding violence and civil unrest.[332] They may also help New York avoid expensive litigation with several of its Indian nations who tend to ally with the Seneca Nation over matters involving the production and sale of Indian tobacco products.

However, despite the benefits of forbearance to both parties, its undesirable long-term legal and economic challenges—especially for the State of New York[333]—have made its benefits short-lived.[334] In the 1990's, the State of New York practiced a policy of forbearance which resulted in judicial recognition by New York state courts of the discretion possessed by the state executive branch to refrain from collecting sales and use taxes on reservation sales to non-Indians.[335] Consequently, the distribution of tax exemption coupons to Indian nations as part of New York's tobacco tax policy became dependent upon the receipt of permission from the Governor of the State of New York.[336] Not only did this place an enormous amount of pressure on the Governor, it also highly politicized the issue because the enforcement of tobacco taxation on Indian lands became something that changed with each gubernatorial election.[337] With each tax free purchase of

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reservations"); U.S. v. Kaid, 241 F.App'x 747, 750 (2d Cir. 2007) (concluding that the Buffalo Creek Treaty "clearly prohibit[s] only the taxation of real property, not chattels like cigarettes").

[332] *See Executive Refusal*, *supra* note 321, at 2 (finding the blockade of the New York State Thruway by members of the Seneca Nation in which the "State faced threats and experienced violence during its efforts to collect the tax" to have resulted in New York's "forbearance policy.").

[333] *See* N.Y. State Convenience Ass'n of Convenience Stores v. Urbach, 92 N.Y.S.2d 204 (1998); *see generally Executive Refusal*, *supra* note 321 (arguing that the forbearance policies were a failure, and that state tax laws should be enforced upon New York's Indian nations, including the Seneca).

[334] *See e.g.*, *Executive Refusal*, *supra* note 321, at 9 (arguing that the policy of forbearance continues today regardless of the Governor's political as a result of New York's bipartisan failure to enforce state tobacco tax laws on its Indian nations during and following the 1990's.).

[335] *See e.g.*, *Day Wholesale, Inc.*, 856 N.Y.S.2d at 811 (finding that "[i]n sum . . . . the amended version of Tax Law section 471-e cannot become effective absent certain action, rules and regulations necessary to implement it, and it is undisputed that there have been no such actions taken or rules and regulations promulgated by the Department").

[336] *Executive Refusal*, *supra* note 321, at 10.

[337] *See, e.g.*, *id.*, *supra* note 321, at 8 (Explaining that in 2010 New York estimated that each tax free purchase of one pack of cigarettes deprives its state coffers of $2.75 in excise tax, and that in addition to that loss state and local governments lose an additional fifty cents in tax revenue. The failure of New York governors to collect tobacco taxes

cigarettes by a non-member of the Seneca Nation depriving New York of a sizable portion of revenue,[338] and with the Seneca Nation being an easy political scapegoat, a forbearance policy is not a sustainable solution.[339]

Alternatively, the State of New York and the Seneca Nation can come to the bargaining table and negotiate a settlement that works for both parties. While the idea of negotiating over the tobacco tax dispute is not new,[340] a

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from its Indian nations is argued to have caused an unacceptable loss of legitimate sales to licensed New York retailers, resulting in billions of dollars in unclaimed and community reinvestment revenue.). *See also id.* (citing the Written Testimony of William Comiskey who stated that each year New York practices a policy of forbearance the state loses $200 million in possible tax revenues.). *But see, Testimony of J.C. Seneca*, at 187 (insisting that New York's estimations on lost revenue due to Indian tax evasion is "untrue and misleading," and noting that its businesses in western New York pump over $1.1 billion into the local state economy annually); *id.* at 249 (citing a study conducted by Harvard economist Jonathan Taylor whose studies show New York to employ over 3,000 non-Senecas, and that New Yorkers who buy cigarettes . . . on Indian reservations spend their savings in New York, which arguably benefits the state's local economies).

[338] *See Executive Refusal, supra* note 321, at 8 (discussing New York's estimations of amount of revenue it believes itself to have lost as a result of failure to enforce state tobacco taxes on its Indian nations).

[339] *See, e.g., Comments of the Seneca Nation of Indians on the Proposed Interim Rule to Implement the Prevent All Cigarette Trafficking Act of 2009 ("PACT Act"), Pub. L. 111-157, Presented by Richard E. Nephew, Council Chairman and Co-Chair of The Seneca Nation of Indians Foreign Relations Committee, Before the U.S. Dept. of Justice Bureau of Alcohol, Tobacco, Firearms * Explosives* (June 8, 2010), [hereinafter *Comments of the Seneca Nation of Indians*], at 13 (noting that "the sponsors of the PACT Act and the White House never gave [the Seneca Nation] the opportunity to be respected as a responsible, self-regulating tribal government"). *See also id.* (exclaiming that the Seneca nation "[does] not sell cigarettes to children and [does] not support terrorism," but rather has "simply developed an economy and provided jobs for [their] people based upon the sale of a lawful commodity that non-Indians have long profited from"); *id.* at 13–14 (further stating that "Had [the Seneca Nation] been given the opportunity for meaningful consultation and negotiation, I am confident we could have found common ground that would have not required the sacrifice of thousands of jobs and the Nation's private sector economy.").

[340] *See* Jon R. Sorensen, *State to Collect Levies on Reservation-Bound Cigarettes, Gas,* BUFFALO NEWS, (Feb. 21, 1996), http://www.highbeam.com/doc/1P2-22836598.html (reporting that in February of 1996, the New York State Tax Department adopted administrative regulations to begin the process of collecting taxes on Indian sales of tobacco products to non-Indians that it had begun in 1988. At this time, the State Tax Department gave New York's Indian nations four months to either negotiate plans with New York to develop a taxation scheme, or to face the involuntary collection of taxes by New York. The announcement upset state Indian nations, resulting in a Tribal summit attended by more than 200 Tribal leaders and other Indian officials.). *See also* Karen L. Foster, Comment, *Just Cheap Butts, or an Equal Protection Violation?: New York's*

legitimate effort to truly negotiate as equals has been absent at the bargaining table.[341] Past attempts "negotiations" have accomplished little more than both parties placing their already known positions on the table and conducting the negotiation with a "take it or leave it" attitude—a process which did not bring about resolution.[342] These failures are often cited as a justification for litigation.[343]

Over time, litigation between the State of New York and members of the Seneca Nation has evolved into a zero-sum game over incompatible positions in a courtroom. At the same time, actions favoring violence and forbearance are not sustainable. This note proposes it is time for both parties to once again sit down at the bargaining table—*this time making legitimate efforts to*

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failure To Tax Reservation Sales to Non-Indians, 62 Alb. L. Rev. 697, 705 (1998) (noting that following a protest rally planned for May 14, 1996 outside the Capitol building in Albany, "Governor Pataki lifted the July 5th deadline on the eve of the planned rally and enlisted the aid of a federal mediator in an attempt to help negotiations between the state and Native American leaders."); Susan Schulman, *Leaders Vow to Fight Proposed Tax on Gasoline, Cigarettes*, BUFFALO NEWS, (Feb. 25, 1996), http://www.highbeam.com/doc/1P2-22837345.html (explaining the underlying pressures placed on New York Governor George Pataki to end the July 5, 1996 enforcement deadline and move towards a forbearance policy that resulted from the Albany Protests); *see also* William Glaberson, *supra* note 290.

341 *See* Raymond Hernandez, *supra* note 288 (reporting that the 1997 negotiations between the Seneca Nations and New York broke down after only two days, and on May 22, 1997, Governor Pataki announced the state's official position that it would end its negotiations with the Indian nations, and instead officially announced a "permanent forbearance policy"). *See also id.* (referencing 2003 N.Y. Sess. Laws 579 (McKinney) which was adopted in 2003 following New York's official announcement of forbearance and directed the State Department of Taxation to adopt regulations to tax tobacco sales to non-Indians on reservations); *id.* (adding that in 2005, Tax Law471-e was amended by 2005 N.Y. Sess. Laws 461to include the statement: "non-Indians making cigarette purchase on an Indian reservation shall not be exempt from paying the cigarette tax when purchasing cigarettes within the state"); *Federal Judge Deals Blow to Efforts by Senecas to Continue Internet Tobacco Sales, Statement of Matthew L. Myers, President of Campaign for Tobacco-Free Kids*, Jul.30, 2010, *available at* http://www.tobaccofreekids.org/press_releases/post/id_1224 (noting that "well before the PACT Act was signed into law, the federal Bureau of Alcohol, Tobacco and Firearms and the U.S. Attorney for the Western District of New York tried repeatedly to negotiate with the Seneca.").

342 *See* Testimony of Robert Odawi Porter, *supra* note 317, at 2 (offering the following testimony before the U.S. Senate Committee on Finance: "[M]any aspects of our treaty-recognized freedoms have been eroded over time, particularly those that originally protected our individual tribal citizens. All three branches of government . . . have directly caused or allowed this erosion to occur. Without any express Congressional authorization, over the last 60 years the Treasury Department has forced tribal citizens to become taxpayers in violation of our treaty status.").

343 *See supra* note 341.

negotiate in good faith by moving past their unyielding positions for which there is no room at the bargaining table. As in most negotiations, it is likely that beneath both party's stubborn positions are dynamic interests waiting to be discovered. These interests can, and should, be considered independent of negotiations over sovereignty. If both parties make a legitimate effort to act as equals to negotiate ways to create mutual gain from these hidden interests, the zero-sum curse may finally come to an end while leaving the sovereignty of both parties respected and intact.

B. *The Evolution of the Zero-Sum Dilemma Between New York and The Seneca Nation*

In its current state, litigation between the State of New York and the Seneca Nation over tobacco taxes is only capable of producing one "winner" and one "loser." Because there can only be one winner, movements by each party towards resolution during the litigation process inevitably takes on an "all or nothing" dynamic with no room for middle ground. This is the inevitable zero-sum endgame for a litigated dispute rooted in competing positions regarding the scope of each sovereign's power relative to the other. Consequently, the winning party to litigation will view a court opinion either as legitimizing their sovereign power over the other party to act, or as one that justifies a sovereign exemption from the other's sovereign authority. Conversely, the losing party is likely to view the unfavorable ruling as confirmation of the court's illegitimacy to bind them to an action. With much of the tobacco tax conflict between the State of New York and the Seneca Nation rooted in competing positions on sovereign authority which date back to the beginning of 1700's,[344] it is unlikely a court opinion will change the losing party's mind.

As a result, the winning party cannot collect on its win, and the losing party only finds further justification to legitimize its decision to refrain from

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[344] *See* Testimony of Robert Odawi Porter, *supra* note 317 at 1 (stating that The Seneca Nation of Indians . . . is one of America's earliest allies . . ., living in peace with the American people since the signing of the Canandaigua Treaty over 217 years ago on November 11, 1794."). *See also id.* at 1–2 (reminding the Committee that the Seneca Nation has "entered into numerous treaties and agreements with the United States, "and that the Nation has "always sought to live up to [their] side of this relationship, despite repeated instances in which the United States has not done so." Seneca further states that the treaties responsible for Seneca sovereignty have helped secure the Nation's economic success, and that the Seneca Nation has fought for this success even while "under constant assault from hostile forces—such as the state of New York and private sector predators," who Seneca argues "seek to deprive [the Seneca people] of economic prosperity and return us [them] the poverty of a prior era.").

compliance.[345] This reality puts both parties in an undesirable situation. However, if a losing party in a court case complies with the court's ruling their compliance will be viewed by the winning party as an acquiescence of sovereignty to the winning party. The potential repercussions of such an act by the losing party to the litigation cannot be understated. True compliance by the losing sovereign entity would suggest a willingness to change the *status quo* on their sovereignty simply because of court opinion. This would further suggest a legitimization of a court system that does not share their views on sovereignty and which consequently threatens it. To date, this willing acquiescence of sovereign power has never happened—absent an act of great violence, it likely never will.[346]

The likelihood of compliance by either party with an unfavorable court opinion will be determined by the way in which both the Seneca Nation and the State of New York define their own legitimacy as a sovereign entity—both inside and outside the court—as well as their sovereignty relative to the perceived sovereignty of the other.[347] Consequently, securing compliance on a court order from a party to which it was unfavorable becomes incredibly difficult. New York and the Seneca Nation, like all other sovereign entities, are likely to only comply with those rulings it finds legitimate. They may—but not always—also comply if the threat of violence or harm to their people in the event of noncompliance becomes greater than the need to maintain sovereignty. However, what a sovereign governmental entity considers a legitimate court opinion—meaning that the sovereign entity and their people would view the opinion as legally binding to them—is dependent upon how the sovereign entity defines and understands its own legitimacy as a sovereign power.

The State of New York might accordingly find legitimacy to enact and enforce certain tobacco taxes on the Seneca Nation in the historical events which have shaped its definitions of "state sovereignty" and "Indian

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[345] *See* Susan Asquith & Sharon Linstedt, *supra* note 322 (citing Nephew's claims that "[New York] cites to self-serving legal precedent to justify having a subservient government collect taxes").

[346] *See* Sharon Linstedt et al., *Seneca Nation Leaders, Members Testify at Cigarette Tax Collection Hearing in Manhattan*, PR NEWSWIRE, Oct. 27, 2009, (quoting J.C. Seneca: "For over 200 years, New York State has tried to steal our lands, assert jurisdiction over what lands we have left, and impose its taxes on us and our activities. In response, and in our defense, the United States promised to protect us from any effort by the State to impose its taxes on our territories. . . . Your oaths of office require you to uphold American laws and treaties. Whether you do so or not is up to you, but I assure you that we have no intention of compromising any of our treaty rights that have already been bought and paid for through the relinquishment of most of our aboriginal rights.").

[347] *See* Susan Asquith & Sharon Linstedt, *supra* note 322.

sovereignty" in American Jurisprudence. The specific history and relationship the State of New York has with its Indian nations, including the Seneca Nation, and the various interests New York has invested in the dispute, may all influence its identification and understanding of its own sovereignty.

The Seneca Nation has its own perception of sovereignty and legitimacy that is independent of the thoughts of the state whose borders it finds itself within. The beliefs and perceptions on sovereignty and legitimacy held by members of the Seneca Nation may have even evolved partly or entirely outside of American jurisprudence. Further, the Seneca Nation's views on its sovereign power to either adhere to or be exempt from New York's state tobacco tax laws have been shaped by the collective interests and historical experiences of the Seneca people. Some of these historical experiences are represented in the treaties signed by the Seneca Nation and the federal government. Seneca Nation sovereignty therefore exists independent of the limits other sovereigns may place upon it and may be embodied in documents that do not share the same deep meaning to other states, such as New York.

Differing views on sovereignty and legitimacy complicate the effectiveness of litigation to resolve the tobacco tax dispute. Because New York believes itself to have the legitimate right as a sovereign State to enact and enforce its tobacco tax laws on the Seneca Nation and its members,[348] any refusal by the Seneca Nation to recognize and comply with these laws on Seneca land serves as a direct challenge to New York's belief in its legitimacy to pass and enforce such laws upon the Seneca people.[349] Accordingly, regardless of the specific question before the court, any legal complaint brought by New York against the Seneca Nation or its members

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[348] *See Executive Refusal*, *supra* note 321, at 4 (according to the New York Standing Committee on Investigations and Government Operations, "State taxation of tribal sales of cigarettes to non-tribe members is not pre-empted by federal law . . . [and that] the Supreme Court and other federal courts have upheld efforts by various states to enforce various taxing mechanisms." The Committee based its conclusion on findings that "the United States Supreme Court has consistently held that states may tax the sale of [tobacco] products to non-native Americans."). *See also id.* (citing as examples Dep't of Taxation and Fin. of New York v. Milhelm Attea & Bros. Inc., 512 U.S. 61, 73–78 (1994); Moe v. Confederated Salish & Kootenai Tribes of the Flathead Reservation, 423 U.S., at 482–83; Keweenaw Bay Indian Cmty. v. Rising, 477 F.3d 881, 892 (6th Cir. 2007); City of New York v. Golden Feather Smoke Shop, Inc., No. 08-CV-3966, 2009 WL 2612345 (E.D.N.Y. Aug. 25, 2009.).

[349] *See* Linstedt et al., *supra* note 346; *see also Testimony of J.C. Seneca*, *supra* note 109.

for failing to comply with state tobacco tax laws carries with it the question of which competing sovereign has greater legitimacy in the matter. Similarly, any complaint brought by the Seneca Nation or its members against New York and its entities regarding the applicability of the tax to them will be asking the court the same question.

The Seneca Nation therefore continues to claim a sovereign right to exemption from the payment of tobacco taxes. At the same time, New York has not moved from its position that the Seneca Nation is not exempt from certain tobacco taxes, and that these taxes must be enforced.[350] Both parties' positions reflect unyielding beliefs about their relative sovereignty and the legitimacy of the other party's demands. Consequently, litigation between the parties is a zero-sum game that the winning party will not be able to collect upon, and to which the losing party is unlikely to comply. Fortunately, behind these positions are several interests which have taken a back seat and been masked during prior litigation. Exploring some of the possible interests gives hope to future successful negotiation in a way that has not yet occurred. It is time for the interests of both parties to come to the forefront of the conversation.

C. *The Search for Hidden Interests in Party Positions*

To negotiate in good faith both parties must move past their stubborn positions on sovereignty—at least for now—and focus instead on identifying the underlying interests encompassed in their positions. While only the State of New York and the Seneca Nation can truly confirm what private interests are hidden in their public positions, the exercise of brainstorming possible interests, and exploring the beliefs from which they were born, reframes the discussion on the tobacco tax dispute. It gives the parties a foundation from which they can imagine new options for mutual gain, while bypassing completely a debate about sovereignty—thus leaving sovereignty interests uncompromised.

1. *Possible Interests Underlying New York's Position*

In a 2011 speech, New York Governor Andrew M. Cuomo summarized his position on New York's tobacco tax dispute with the Seneca Nation: "*[T]axes on cigarettes sold to nontribal members must be collected because this is revenue rightly owed to the state, and with this decision, my*

[350] *See, e.g.*, Lisberg et al., *supra* note 4 (citing Mayor Bloomberg).

administration will move to do so expeditiously" (emphasis added).[351] In its battle against contraband cigarettes, New York politicians have made clear that New York has an interest in collecting the generous revenue it feels has been hijacked through "tax evasion" by the State's Indian nations—including the Seneca Nation. Former New York Senator Anthony Weiner, for example, claimed in 2010 that New York had lost over $1 billion to evaded taxes by the State's Indian nations—revenue which Weiner believed should be rightfully returned to New York.[352] It has additionally been argued that New York could bring in over $100 million a year if it successfully enforced the PACT Act and state tax codes on Indian land.[353]

Yet while New York's financial interest in collecting the excise tobacco tax from the Seneca Nation is compelling, it is by no means the only interest. New York's general financial interest can be further broken down into the following smaller, and more revealing, possible interests:

a. *Funding for Social Objectives*

The State of New York's general financial interest in collecting state excise tobacco taxes from members of the Seneca Nation includes an interest in funding programs that further legitimate social objectives. In particular, New York has funds state programs aimed at preventing and combating the negative effects of tobacco use by New York citizens.[354] Seventy-six percent of the revenue collected from excise cigarette taxation in New York funds the tobacco control and initiatives pool from which the state funds major health initiatives.[355] The remaining twenty-four percent goes into the state's

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[351] Precious & Herbeck, *supra* note 318 (quoting former Governor Andrew M. Cuomo).

[352] PREVENT ALL CIGARETTE TRAFFICKING ACT OF 2009, 156 Cong. Rec. 1526-01 (2010) (statement of N.Y. Sen. Anthony Weiner), 2010 WL 956208 at 26 [hereinafter PACT ACT].

[353] *See* Tom Precious, *State Launches Crackdown on Reservation Cigarettes,* BUFFALO NEWS, (July 13, 2011), www.buffalonews.com/cityarticle488070.ece (reporting that the Cuomo administration released this estimate assuming the state collects a maximum of $4.35 in tax on each pack of cigarettes).

[354] *See generally* MICAH BERMAN & MARLO MIURA, CENTER FOR PUBLIC HEALTH AND TOBACCO POLICY: CIGARETTE TAX EVASION IN NEW YORK (2011), *available at* http://publichealthlawcenter.org/sites/default/files/resources/nycenter-policybrief-cigtaxevasion-2011.pdf [hereinafter TAX EVASION IN NEW YORK].

[355] *Id.*

general fund.[356] Additionally, New York uses the revenue it generates from state tobacco taxes to fund preventative programs geared towards preventing smoking-related diseases.[357] These programs raise public awareness of the risks and hazards of cigarette and tobacco use, provide assistance to individuals who are trying to quit using tobacco products, and strive to change cultural norms and perceptions within the state about tobacco use.[358]

As part of its preventative efforts, New York has taken a strong stance against internet vendors selling tobacco products from Indian country absent any tax. New York's protest of Indian internet vendors who ship tax-free tobacco products to sellers outside of Indian Country is due in part to the high potential revenues a successful tax on such sales could bring.[359] However, New York has also expressed concern that Indian internet vendors have become an increasingly popular way for youth to unlawfully access cigarettes and other tobacco products.[360] This leaves open the frightening

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[356] *See* N.Y. TAX LAW § 482(b) (McKinney 2010); *Cf.* N.Y. State S. Fin. Comm., 2010 Mid-Year Report on Receipts and Disbursements at 31, Nov. 2010 *available at* http://www.nysenate.gov/press-release/new-york-state-senate-finance-committee-2010-mid-year-report-receipts-and-disbursement (noting that the rules controlling distributions from the tobacco control and insurance initiatives pool are found in the Public Health section of the state law). S*ee also* N.Y. PUB. HEALTH LAW § 2807-v (2010).

[357] TAX EVASION IN NEW YORK, *supra* note 354, at 2.

[358] *See id.* at 5 (noting that New York has both a social and a financial goal in preventing and reducing tobacco use because "for every dollar spent on tobacco control programs, over three dollars are saved in 'avoided direct medical costs,'" but that in 2011, the amount of state spending for tobacco control programs in New York was at its lowest since 1999, with funding for tobacco control programs cut by 30% in 2010 due to state budget shortfalls). *See also* N.Y. State Tobacco Control Program, Leading the Way Toward a Tobacco-Free Society: 2010–2013 (2010) *available at* http://www.nyhealth.gov/prevention/tobacco_control/docs/leading_the_way_2010_2013.pdf (stating that New York generates about $1.4 billion in state tobacco tax revenue, but then spends about $8.17 billion a year on health care costs related to smoking related illnesses, with approximately $5.47 billion coming from New York's state Medicaid fund).

[359] *See* Kevin Davis et al., *Cigarette Purchasing Patterns Among New York Smokers: Implications for Health, Price, and Revenue,* New York State Department of Health March 2006, at 15 (noting that in 2004, New York reported it had lost between $106 million and $ 122 million in tax revenue from Internet and telephone cigarette vendors).

[360] *See* U.S. GENERAL ACCOUNTING OFFICE, GAO-04-641, CIGARETTE SMUGGLING: FEDERAL LAW ENFORCEMENT EFFORTS AND SEIZURES INCREASING, at 7 (2004) (reporting that according to the Bureau of Alcohol, Tobacco, and Firearms, "some cigarette smugglers have ties with terrorist groups, and there are indications that terrorist group involvement in illicit cigarette trafficking, as well as the relationship between criminal

image of Indian internet vendors selling tax-free cigarettes at substantially low prices without asking for identification or age verification.[361]

b. *Protecting New York Citizens Against National Security Threats*

Unregulated and effectively untaxed internet tobacco venders in Indian Country create a prime opportunity for terrorists to fund their activities—an event any state would want to discourage. Individuals engaging in terrorism can purchase large quantities of untaxed cigarettes and resell them on the black market at prices lower than states with hefty tobacco taxes, but higher than their purchase price.[362] The Governing Accounting Office ("GAO") legitimized New York's concern in this matter when it linked cigarette smuggling in New York to Hezbollah and other international terrorist organizations. According to the GAO, terrorists purchase contraband cigarettes, resell them in a more expensive state, and then use the profits to fund illicit activities.[363]

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groups and terrorist groups, will grow in the future because of the large profits that can be made.").

[361] *See Postal Cooperative Mail and Nonmailable Tobacco: Hearing Before the Subcomm. on the Federal Workforce, Postal Service, and the District of Columbia*, 110th Cong., (April 24, 2008) (statement of William V. Corr., Executive Director of Campaign for Tobacco Free-Kids), 2008 WL 1839293, [hereinafter *Eliminating Smoke and Mirrors*] at 2 (explaining that one reason New York officials are concerned with Internet vendors that do not verify the purchaser's age is that Internet sellers typically set their minimum purchase requirement of cigarettes as low as two cartons, "which can turn youth who buy cigarettes over the Internet into suppliers for other underage smokers as well."); *see also* Eric Lindblom, *Campaign for Tobacco-Free Kids, Internet Sales of Tobacco Products: Reaching Kids and Evading Taxes*, Apr. 2008, *available at* http://www.tobaccofreekids.org/research/factsheets/pdf/0213.pdf.

[362] *See* Michael Beebe, *Cigarette Smuggling Conspiracy nets Prison for 2 Seneca Women,* BUFFALO NEWS, Apr. 14, 2004, at B2 (reporting that in April of 2004, members of the Seneca Nation were convicted of selling untaxed cigarettes to individuals connected to Hezbollah who were operating a smuggling ring on the black market). *See also* Republican Staff of U.S. House Committee on Homeland Security, *Tobacco and Terror: How Cigarette Smuggling is Funding Our Enemies Abroad* (2008), available at *https://s3.amazonaws.com/s3.documentcloud.org/documents/412462/tobacco-and-terror-how-cigarette-smuggling-is.pdf* (detailing federal concerns about terrorism and illicit cigarette trafficking).

[363] *See* 146 CONG. REC. S1480–87 (daily ed. March 11, 2010)(statement of Sen. Herb Kohl) (describing an incident in November of 2009 where BATFE charged 14 people with paying over $8 million, 40 firearms, and drugs, to buy 77 million contraband cigarettes to sell in New York. Kohl praised the bill for finally giving state law enforcement officers the enforcement tools they needed to manage the dangers associated with contraband cigarette sales).

c. *Preventing Job Diversion and Capitalizing on the 1998 Phillip Morris Settlement Agreement*

The State of New York's efforts to prevent tobacco-related illnesses and keeping cigarettes out of the hands of youth are not new. Yet, the high level of enthusiasm Phillip Morris and other big name New York tobacco manufacturers share over the enforcement of the terms of the PACT Act make New York and its big brand tobacco industries look like strange bedfellows. One possible explanation is that an Indian nation production scheme which bypasses state taxation laws would shift jobs away from state tobacco workers and onto Indian land.[364] It would also reduce the high level of competitiveness traditionally enjoyed by the state's major tobacco corporations.[365] Such a scheme would additionally greatly decrease the amount of money tobacco corporations within New York are required to pay as a result of the 1998 settlement agreement[366] between the major American tobacco companies and the Attorney Generals of forty-six states—with one of those forty-six states being New York.[367]

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[364] *See* Toensing, *supra* note 3 (reporting that without enforcement of New York's tobacco tax on Indian retailers, changes in state law which have encouraged Indian nations to manufacture cigarettes on their own land instead of purchasing from other wholesalers for resale have resulted in a decrease of sales for New York's wholesalers by 20–30%).

[365] *See id.* (reporting that the overnight success of Indian nation tobacco retailers has resulted in cigarette plants once operated by Phillip Morris in Western New York to transfer its business to Indian nation tobacco producers and away from Phillip).

[366] The Tobacco Control Resource Center, Inc., The Multistate Master Settlement Agreement and the Future of State and Local Tobacco Control: An Analysis of Selected Topics and Provisions of the Multistate Master Settlement Agreement of November 23, 1998 [hereinafter MSA].

[367] *See Prevent All Cigarette Trafficking Act of 2007 and the Smuggled Tobacco Prevention Act of 2008: Hearing on H.R. 4081 and H.R. 3689 Before H. Comm. on the Judiciary*, 100th Cong. 53 (2008) (statement of Matthew L. Myers, President of the Campaign for Tobacco-Free Kids [hereinafter "PACT Act & STOP Act Hearing"] (stating that "contraband cigarette trafficking can also reduce the annual tobacco settlement payments to the states. Former Senator Anthony Weiner was one such New York politician, and was accordingly instrumental in the passage of the PACT Act. Those settlement payments are supposed to be adjusted downward based on the U.S. cigarette consumption declines—but the MSA formulas are based solely on changes to legal cigarette sales. When smokers shift to illegal cigarettes, consumption does not actually decline, but payments to the states do."). *See also* Kaplan, *supra* note 8 (quoting David Sutton, a spokesperson for Altria, the parent company of Phillip Morris, the country's largest cigarette manufacturer as saying: "All cigarettes sold to non-Native American

d. *For New York Elected Officials: Gaining Political Capital*

For New York elected officials there is a potential personal interest in successfully achieving compliance by Indian nations in collecting state tobacco taxes.[368] First, the tax is one of the rare situations in which a tax increase creates a win-win outcome for the elected official.[369] An increased cigarette tax not only generates a legitimate revenue "windfall" for many local jurisdictions, but also, the move at a political level is one in which the elected official is often praised for making a socially undesirable commodity more expensive, and thus, in theory, more difficult to obtain.[370] Second, collection of the tax creates revenue for New York's public agencies and special interest groups, which is especially desirable by groups in fields related to health or public employment.

Accordingly, some New York politicians have historically asserted state sovereignty in their justification of efforts to regulate Seneca tobacco production when they feel that doing so is not only in the best interest of the state's citizens, but will also put themselves in a favorable light with constituents.[371] Like any government, New York's state sovereignty is shaped in part by the legitimacy its subjects bestow upon its leaders and elected officials to govern them. This legitimacy, however, is given in exchange for the leaders promising to use that power to benefit the popular interest and public good. The popular interest and public good is often carried out by public agencies and special interest groups, which raises the stakes on the politicians responsible for generating the necessary revenue for their operation.

2. *Possible Interests Underlying the Seneca Nation's Position*

Council Chairman for the Seneca Nation, J.C. Seneca made the position of the Seneca Nation clear when he declared: *"We're never going to succumb*

New Yorkers need to be tax-paid—regardless of who manufactures them—or New York State will continue to lose legitimate and significant tax revenue, and law—abiding retailers will continue to be impacted by cigarette tax evasion.").

[368] *See* PACT Act & STOP Act Hearing, *supra* note 367 (noting that former Sen. Weiner was one such figure who was instrumental the passage of the PACT Act).

[369] *See* Sirois, *supra* note 167, at 34.

[370] *See id.* at 35 (describing the tobacco tax on Indian nation sales to non-Indians as "an enhancement of sumptuary or so-called 'sin taxes,'" which are already popularly leveled on tobacco as a way to "discourage the consumption of tobacco, yet also constitute a stable source of revenue for taxing jurisdictions").

[371] *See supra* Section II.

to the state collecting taxes from us" (emphasis added).[372] The unyielding language in the Council Chairman's statement reflects the belief among many members of the Seneca Nation that the tobacco tax dispute is inexorably linked to their interest in protecting the sovereignty of their people.[373] But while the Seneca Nation's strong defense of their position on sovereignty may seemingly complicate negotiations between the Seneca Nation and New York, it by no means removes the option of negotiation from the table. Instead, the possibility of dynamic interests and beliefs woven into the fabric of the Seneca Nation's position on sovereignty make the dispute between the two sovereigns ripe for negotiation.

The Seneca Nation's position and the fundamental purpose it serves of protecting the Nation's sovereignty is not so stubborn as to prohibit the State of New York from successfully negotiating with them in good faith. The Seneca Nation's position does, however, require New York to acknowledge the legitimacy of Seneca's sovereign beliefs and to treat the Nation with the type of respect it would give to any other sovereign entity. While New York has attempted this feat by making statements saying that it respects and recognizes Seneca Nation sovereignty,[374] its actions have painted a very

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[372] *See* Precious & Herbeck, *supra* note 318 (quoting J.C. Seneca, of Irving, a major Seneca tobacco retailer and manufacturer who currently serves as Council Chairman for the Nation).

[373] *See* Fink, *supra* note 313 (quoting Seneca Nation President Robert Odawi Porter responding to a New York Appellate Ruling which allowed New York to collect past due sales tax on tobacco sales made on sovereign Indian territory to non-Indians: "We will continue to block the state's long-standing crusade to confiscate our national wealth, sacrifice native and non-native jobs and interfere with our way of life. . . . For more than 200 years, the Seneca Nation has thwarted New York State's efforts to steal our land, destroy our sovereignty, and tax commerce in our territories. In our treaties with the United States, we gave up most of our land to retain the 'free use and enjoyment' to conduct business in our remaining territories free from the state's taxes. New York will never collect a cent of revenue from tobacco sales occurring in our territories, and revenue projections so indicating are foolishness.").

[374] *See* INDIAN LAW § 6; Fellows v. Denniston, 23 N.Y. 420, 425 (1861), *rev'd on other grounds*; *In re* the New York Indians, 72 U.S. 761 (1866) (recognizing the legal doctrine of "tribal sovereignty" since 1861, which has been recognized by New York is not to enact laws that interfere with tribal self-government). *See also Executive Refusal, supra* note 322, at 4 (defining "tribal sovereignty" as understood by New York to mean that its Indian nations have the right to "exercise their inherent power to govern their own internal affairs"); Michelle O'Donnell, *Tax on Sales at Indian Reservations Blocked,"* NEW YORK TIMES, Nov. 16, 2004 (quoting former New York Governor Pataki, justifying his vetoing of a bill that would have taxed cigarettes sold to non-Indians on Indian land: "One of the important things I've strived to do is reflect the sovereignty as guaranteed by

different picture.[375] In particular, the Seneca Nation often finds its differences with New York over the tobacco tax dispute met with a unilateral piece of state legislation specifying its demands for the Seneca Nation and the consequences for noncompliance.[376] Thus, while New York may claim to have attempted compromise, its efforts to enforce legislation and regulations that have been unilaterally drafted and passed. This is the antithesis of New York showing the Seneca Nation—or any other sovereign entity—that it respects their sovereignty.

Any exploration of party interests is futile if the Seneca Nation is denied the full respect of a sovereign government to sit at the bargaining table with New York as an equal. Giving full government respect to Seneca Nation sovereignty requires New York to stop treating its unilaterally passed legislation as having a greater weight of authority than the ideas or pleas for negotiation coming from the Seneca leaders. Failure to do so will throw off the power dynamic, tempt the parties to resort back into their positions, and then eventually force the dispute back in zero-sum litigation. While the interests protected by the Seneca Nation's position on sovereignty might bee dynamic and plentiful, the Seneca Nation lacks any incentive to negotiate upon them if they do not feel New York views their contributions to the negotiation as coming from an equal.[377] Yet, if New York treats the Seneca Nation as a sovereign at the bargaining table, both parties can remove sovereignty from the agenda items and instead negotiate upon the full range of interests just as New York would negotiate with any other sovereign.[378] It

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state and federal treaties, and to negotiate in good faith. . . . I believe we can do this through consent, where we can reach agreement with the tribal nations.").

[375] *See* Testimony of Robert Odawi Porter, *supra* note 317.

[376] *Id.*

[377] *See* Tom Precious, *State Drops Collection of Taxes on Indian Cigarettes, Writes off Revenue from Reservation Sales*, THE BUFFALO NEWS, Aug. 15, 2009 (reporting that Governor Paterson told the media he wanted to resolve the dispute through negotiation; however, very early on critics had warned that "with the stakes so lucrative, the Indian tribes, especially the Senecas, have little reason to negotiate"). *See also* Fink, *supra* note 313 (noting that in 2011, Seneca Nation President Robert Odawi Porter announced that the Seneca Nation was embarking on a "'new era' by manufacturing and selling its own brand of cigarettes," and that "[t]raditional premium brands of cigarettes will not be sold from businesses operating on sovereign territory." Porter explained that he wanted "to make sure the Seneca's tobacco economy is 'sustained and regulated.'").

[378] *See* Testimony of Robert Odawi Porter, *supra* note 317, at 3 (suggesting "that the promise of tax reform will have the most impact if it advances the first principles that are at the foundation of federal Indian policy at its best—***tribal nations are governments whose exclusive authority to govern all economic activity on their territory is fully respected as a matter of federal law***. . . If the goal is to increase economic growth in

would then no longer matter what positions and beliefs each party held about their sovereignty or the sovereignty of the other, as sovereignty would no longer be on the negotiation agenda. The process of negotiating in good faith as equals protects the sovereignty interest of both parties without making it a negotiation item or a roadblock to settlement.

The rest of this section discusses possible interests which may underlie the Seneca Nation's position in the tobacco tax dispute with New York. In discussing the possible merit of these interests, it is assumed that the parties will negotiate as equal sovereigns in a manner conducive to respecting the sovereignty of each.

a. *Preserving the Integrity of the Treaty of Canandaigua*

The Seneca Nation holds great pride in the recognition of their status as a sovereign nation under the Treaty of Canandaigua almost 217 years ago.[379] This treaty—which explicitly bestows the right upon the Seneca Nation to the "free use and enjoyment" of their lands—is often viewed as the basis for the level of freedom and economic success which the Seneca people enjoy.[380] The Seneca Nation was the only Indian nation to have succeeded in securing its land in western New York despite an aggressive state removal policy.[381] Accordingly, their ability to secure the survival of their people was assured with the Treaty of Canandaigua.[382] This story of survival provides the backdrop to the Seneca Nation's refusal to comply with any New York law or regulation that violates their sovereignty as established by the terms agreed to in the Treaty of Canandaigua.[383]

Indian Country, tribal territories must be recognized as places of economic opportunity for tribal governments and tribal citizens.").

[379] *See* Testimony of Robert Odawi Porter, *supra* note 317, at 1.

[380] *See id.* at 2 (testifying that "[t]he key promises made to us by the United States in the Canandaigua Treaty . . . has served as the basis for a level of freedom possessed by the Seneca people that is among the highest levels of all indigenous peoples in the United States. Because of this treaty-protected freedom, our Nation has been able to achieve some success in recovering from nearly 200 years of economic deprivation inflicted upon us by the United States due to devastating losses of our land and resources." Porter says the Treaty has brought benefits to both the Seneca Nation government and Seneca citizens, "primarily on available business involving tobacco, gambling, and ancillary ventures.").

[381] *See* Hopkins, *supra* note 116.

[382] *See* Testimony of Robert Odawi Porter, *supra* note 317, at 2.

[383] *See Seneca Nation of Indians, Keeper of the Western Door*, 2012, *available at* sni.org/culture/treaties (stating that the Seneca Nation believes the rights and obligations provided for in the Treaty of Canandaigua Treaty are protected according to Article VI of

Further, because of what the Treaty of Canandaigua represents to members of the Seneca Nation, the Seneca Nation cannot comply to the terms of any state law unilaterally drafted or which directly violates the Treaty without also giving up—at least symbolically—the victories clenched by their ancestors who fought to protect the existence of their people as a sovereign nation. It has not been forgotten by the Seneca people that with the signing of the Treaty of Canandaigua, the Seneca Nation surrendered much of its land to in return for the sovereign rights it aims to protect today.[384]

The Seneca Nation's ability to protect the integrity of the Treaty of Canandaigua is at stake in its tobacco tax dispute with New York. This is because the Treaty of Canandaigua provides immunity from all federal and state taxation upon their people or their lands.[385] Consequently, passing of legislation or enactment of regulations by the state which essentially taxes or regulates Seneca tobacco without the Seneca Nation's consent, puts the Seneca Nation at risk for further encroachment into the rights their ancestors secured in the signing the Treaty of Canandaigua.

b. *Providing Economic Security and Self-Sufficiency*

The Seneca Nation has a significant economic interest in not paying the state tobacco tax. Seneca Nation President Robert Odawi Porter has made clear that "[t]here is a direct link between the harsh poverty and devastating unemployment that has long existed in Indian County and the taxation and regulation by other governments of activities in [its] tribal territories.[386] Taxes on tobacco sales would greatly weaken the competitive advantage Seneca Nation retailers currently have over state retailers.[387] The enforcement of a tobacco tax has also been found by the New York Court of

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the U.S. Constitution, like all other treaties, and therefore are the "supreme law of the land." As such, the Seneca Nation find the "protection of treaty rights [to be] a critical part of the federal American Indian trust relationship.").

[384] *See* Testimony of Robert Odawi Porter, *supra*note 317, at 2 (explaining that these rights and promises included recognition of the Seneca Nation as a sovereign nation, insurance that Seneca property and activities would not be taxed, that the Nation would forever secure title to their lands, and that the United States would expressly guarantee the Seneca Nation would retain the "free use and enjoyment of their lands").

[385] *Id.*

[386] *Id.* at 2–3 (explaining that "[w]hile there are many factors that contribute to the economic underdevelopment of Indian Country, tax burdens imposed by external governments contribute to making Indian country in some cases the last place in America where meaningful capital investment and job creation will occur").

[387] *See id.*

Appeals to adversely impact over 3,000 individuals employed in the Seneca tobacco economy.[388] The Seneca Nation has fought hard to protect its recent economy, and its leaders compare its current efforts to sustain economic success with its tireless fight to protect its lands.[389] New York's current efforts have thus been viewed by some Seneca leaders as predatory acts by those who "seek to deprive [the Seneca] of economic prosperity and return [them] to the poverty of a prior era."[390]

Economic success from their thriving tobacco industry also increases the self-sufficiency of the Seneca Nation. Increased self-sufficiency allows for the Seneca Nation's government to better provide for its people without having to seek state or federal assistance. Assistance often comes in the form of subsidies, which require the undesirable signing of contracts saturated with entanglement language that would place the Seneca Nation at risk for future encroachment by both state and federal government. Encroachment could create further dependency, weaken the Seneca Nation government, and leave the Seneca Nation with less bargaining power and legitimacy from both its people and the outside world.[391]

Losing the tobacco tax dispute accordingly has the potential to decrease the strength and self-sufficiency of the Seneca Nation government and its people, all while dismantling its potential to become an increasingly important player in the tobacco business.

c. *Increasing Power and Prestige for the Seneca Nation*

A couple centuries ago, the level of economic success enjoyed today by the Seneca Nation would have been unthinkable to most.[392] But with a historically tumultuous relationship between the Seneca Nation, and state and federal government, contemporary economic gains by the Seneca Nation

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[388] *See* Seneca Nation of Indians v. State of New York, 89 A.D.3d 1536 (N.Y. App. Div. 2011) (finding that after the completion of a Jobs Impact Statement by the State Finance Department which confirmed the devastating impact, the negative economic impact to Indian reservations from the state's cigarette law was caused by the law itself, and not by regulations adopted to carry out the law, and therefore the regulations were lawfully adopted).

[389] *See* Testimony of Robert Odawi Porter, *supra* note 317, at 2.

[390] *See id.*

[391] *See id.* (emphasizing that it has taken the Seneca Nation over 200 years to get to where it is today, and that its people have succeeded despite devastating losses of both their lands and resources).

[392] *See id.* (noting the high level of economic success of the Seneca people relative to other indigenous populations in the United States).

represent more than a financial benefit to the Seneca people. For any sovereign government—including the Seneca Nation—economic independence and self-sufficiency is an expression of sovereign legitimacy. Thus, economic growth and success reaffirms to New York, the federal government, and the outside world in general, that the Seneca Nation is worthy of its sovereign title, and that in its sovereign capacity it provides for its people without depending on New York or the federal government for assistance.

V. CONCLUSION

> "*The very concept of sovereignty suggests that a government maintains the ability to govern freely without unsolicited interference from compeer bodies.*" (emphasis added).[393]

The conflict between the Seneca Nation and the State of New York is undeniably convoluted and seemingly intractable. Yet, perhaps this is simply the inevitable endgame for a dispute that has been battled for far too long in a legal arena unsuitable to its unique and complex needs. In the adversarial litigation progress which serves as the hallmark of the American legal system, disputes are ruled on by judges constrained by intricate rules of jurisdiction and legislative canons of interpretations. The arguments heard by judges are prepared by lawyers trained to argue their client's position within the confines of the legal traditions of the United States. While this judicial framework in the United States has successfully handled many difficult disputes for more than two centuries, its merits decline significantly when positions taken by the parties to a dispute have deeply historical and personal sovereignty interests attached to them which the system is unable to address.[394]

This has proved true in the dispute between the Seneca Nation and the State of New York over the taxation of tobacco products sold on reservation land to non-members. Courts have consistently refused to provide a definitive ruling on the merits of the Seneca Nation's claim in defense to New York's tax laws that it has sovereign immunity under treaties it signed with the federal government.[395] Yet, while courts may continue to decline to

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[393] Sirois, *supra* note 167, at 68.

[394] *Id.*

[395] Dep't of Taxation & Fin. of New York v. Milhelm Attea Bros., Inc., 512 U.S. 61, 77 n. 11 (1994)("We do not address this contention, which differs markedly from respondent's position and which was not addressed by the Court of Appeals.").

rule on the merits of the Seneca Nation's complaint, the Seneca Nation remains astutely aware of the wounds it suffered as a result of more than a century of "predatory" efforts by New York to infringe upon the rights set forth in its treaties.

By the same mark, New York has been attempting to assert influence over its Indian nations for centuries, only to be unilaterally blocked almost every time by defenses rooted in the language of federal treaties. However, with the recent trend of courts declining to address the merits of claims brought before it on the issue of sovereign immunity, New York has a window of opportunity to try and take back some control over its Indian nations that it might have lost under federal treaties.

This process produces a zero-sum result. As previously established, the adversarial litigation process forces parties to argue positions—which is what both parties to the tobacco tax debacle have already done. History has further entangled each party's position with interests in sovereignty, such that all wins and losses in the courtroom over asserted positions translate to wins and losses of sovereignty by the parties in the real world. Considering the Seneca Nation's historical battle to maintain its sovereignty over centuries of state encroachment, it is unlikely to concede to state taxation laws which infringe upon the same principle of sovereign immunity it has fought to protect. The process polarizes the two parties—making it nearly impossible to find options for mutual gain—and instead leaves both parties in a race to find and assert the strongest position to represent its interests in court.

Taking the dispute outside of the traditional legal realm and placing it into a negotiation setting allows both parties to work toward resolution by using a process that does not require either party to formally accept the sovereignty position of the other. Each party would be met at the bargaining table as an equal, which enables each to free themselves from positions they previously used to protect their sovereignty interests. Both parties would be invited to explore the multitude of economic, health, security, social, cultural survival, and self-sufficiency interests that have taken a backseat in the dispute for far too long. In this proposed process, as the parties begin to introduce other underlying interests, new alternatives and options for mutual gain will present themselves—upon which the foundation for a sustainable resolution may begin to take form.